91-143

Supreme Court, U.S.
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No.

in the

Supreme Court
of the
United States

October Term, 1991

RONALD TOBIN and
CLIFFORD ROGER ACKERSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

ASSUMING PROBABLE CAUSE EXISTS, DOES THE MERE PRESENCE OF NARCOTICS IN AN OCCUPIED DWELLING CREATE AN EXIGENCY JUSTIFYING A WARRANTLESS HOME ENTRY, WHEN THERE ARE NO PARTICULAR CIRCUMSTANCES SUGGESTING THAT DESTRUCTION OF THOSE NARCOTICS IS ONGOING OR IMMINENT?

II.

DO OFFICERS WHO CONTINUOUSLY KNOCK AND ANNOUNCE THEIR PRESENCE AT AN OCCUPIED DWELLING, WITH PROBABLE CAUSE TO BELIEVE THAT NARCOTICS ARE INSIDE, IMPERMISSIBLY CREATE AN EXIGENCY, BARRING THE USE OF THAT EXCEPTION TO THE WARRANT REQUIREMENT AND RENDERING ANY SUBSEQUENT SEARCH UNCONSTITUTIONAL?

III.

IS THE DECISION BELOW, WHICH FOUND CONSENT WHEN A HOMEOWNER OPENED HIS DOOR IN RESPONSE TO ARMED OFFICERS KNOCKING AND SHOUTING FOR 3-4 MINUTES, CONTRARY TO DECISIONS OF THIS COURT AND OF OTHER CIRCUITS WHICH HAVE HELD THAT OPENING A DOOR IN RESPONSE TO A SHOW OF AUTHORITY IS NOT VOLUNTARY CONSENT?

IV.

IS A CRIMINAL DEFENDANT WHO DOES NOT PETITION FOR REHEARING OR REHEARING EN BANC DENIED DUE PROCESS OF LAW WHEN THE COURT OF APPEALS GRANTS AN UNSUCCESSFUL CO-DEFENDANT'S PETITION FOR REHEARING, AND THE GOVERNMENT FAILS TO CROSS-PETITION, AND THE EN BANC COURT REVERSES THE NON-PETITIONING DEFENDANT'S FULL RELIEF GRANTED BY THE PANEL?

PARTIES

The names of all parties appear in the caption of the case.

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JURISDICTION AND OPINION BELOW

The judgment to be reviewed was entered by the Eleventh Circuit Court of Appeals on February 21, 1991, in *United States v. Tobin*, 923 F.2d 1506 (11th Cir.1991) (en banc), *vacating* 890 F.2d 319 (11th Cir.1989). A timely petition for rehearing was filed, and on May 31, 1991, the court denied

rehearing of the en banc decision. This Petition has been filed within 90 days of that date. Copies of the panel decision, the en banc decision and the order denying rehearing are reprinted in the Appendix to this Petition.

This Court has jurisdiction based on 28 U.S.C. § 1254(1). This case presents a conflict between the opinion below and previous decisions of both this Court and Circuit Courts of Appeals. It also presents an important but unsettled question of law regarding exigent circumstances in narcotics cases.

CONSTITUTIONAL PROVISION

Constitution of the United States

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. *Procedural History*

This petition seeks review of an en banc decision of the Eleventh Circuit Court of Appeals denying both Petitioners' motions to suppress evidence because it was obtained in violation of the Fourth Amendment to the United States Constitution.

Petitioners were charged in the United States District Court, Southern District of Florida, with intent to distribute cocaine in violation of 21 U.S.C.A. §§ 841(a)(1) and 846, and 18 U.S.C.A. § 2. Ackerson was also charged with possession with intent to distribute marijuana in violation of 21 U.S.C.A. § 841(a)(1).

A United States magistrate recommended that the district court grant both defendants' motions to suppress, but after a *de novo* hearing on standing, the trial court denied both motions.

The defendants entered into a plea agreement and pled guilty to possession with intent to distribute cocaine, reserving the right to appeal the denial of their motions to suppress and to withdraw the guilty pleas if they prevailed. They were both sentenced to fifteen years imprisonment and fines of $100,000, but remained free on bond pending the appeal.

The Eleventh Circuit reversed the denial of Ackerson's motion to suppress, but affirmed the denial of Tobin's motion. *United States v. Tobin*, 890 F.2d 319, 332 (11th Cir.1989) Pet.App. 29. Tobin filed a petition for rehearing with a suggestion for rehearing en banc, but Ackerson, who had obtained full relief, did not join that petition. The government did not file a cross-petition. On May 16, 1990, the panel opinion was vacated and rehearing en banc was granted. *United States v. Tobin*, 902 F.2d 821 (11th Cir.1990).

The en banc court affirmed the district court's denial of both defendants' motions to suppress, and did not reach the standing issue. *United States v. Tobin*, 923 F.2d 1506, 1509 (11th Cir.1991) (en banc) Pet.App. 1. Rehearing was denied.

B. *Statement of the Facts*

Four federal narcotics agents were positioned in a field near Petitioner Ackerson's house in Miami, on an unrelated surveillance mission. Mid-afternoon, using binoculars, they observed a suspicious car – similar to one observed earlier in conjunction with the other surveillance – drive up to Ackerson's house. The facts prior to the search were set out in the panel opinion:

> Agents Roberts and Widener saw the car quickly stop in the middle of the street and back into the driveway of the residence at 10411 S.W. 144th Court. There was already a pickup truck parked in the front yard of that house. Appellant Ronald Tobin then jumped

> out of the car, looked around, and ran to the front door of the residence. Tobin knocked and within one minute, Ackerson admitted him to the house. Shortly after Tobin entered the house, the garage door was opened three-quarters of the way by Ackerson, who looked up and down the street while holding the door. Tobin also peered out of the garage and, looking up and down the street, he crouched down and eased out of the garage. Tobin then used a key to open the trunk of the car he had parked in the driveway. He took three full tubular plastic bags out of the trunk and very quickly put them into the garage. The bags were about four feet long and were covered in heavy clear plastic wrapping, with smaller packages inside. Tobin again looked up and down the street and immediately hopped back into the garage.

890 F.2d at 322. Pet.App. 30-31.

Based upon those facts, the court below found that the agents had probable cause to search Ackerson's house. The agents suspected that the bags contained cocaine, so they immediately approached the house in the hopes of securing a consent search. They made no attempt to obtain a warrant. The record does not reveal whether Petitioners knew they were being observed, although one agent testified that he did not believe he was noticed.

Three agents drove to the house in separate unmarked vehicles. One positioned himself near the garage with his gun raised, apparently out of sight of the front door. Two others went to the front door with their guns unholstered but not drawn. Agent Roberts knocked on the door, and repeatedly shouted in English and Spanish, "I'm a police officer, I would like to talk to you, I need for you to come here."

After three of four minutes of the agent's knocking and calling out to him, Ackerson opened the door. Roberts identified himself as a Customs agent, displayed his credentials, and explained that based on what he had observed he believed

cocaine was in the garage. During the conversation, in which Ackerson initially denied that he knew anything of the car and that anyone else was inside the house, Agent Roberts smelled marijuana from within the house.

Tobin then appeared at the doorway and stepped outside with Agent Roberts. Within fifteen minutes, Roberts told them that they should all go to the garage, at which time Ackerson, without speaking, turned and walked inside toward the garage. Agent Roberts entered the house behind Ackerson, followed by Tobin and Agent O'Neil.

Subsequently, cocaine was found in the garage and Petitioners were arrested. The agents performed a security sweep of the house and seized marijuana from a shower stall. In the garage, Agent Widener searched a station wagon parked inside after noticing that the screws had been removed from the floorplate. He found paper bags containing $775,000 in currency. Both Ackerson and Tobin denied knowledge of and ownership of the station wagon.

Petitioners moved to suppress the evidence based on the lack of a warrant and the absence of either consent or exigent circumstances as exceptions to the warrant requirement.

REASONS FOR GRANTING CERTIORARI

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE VARIOUS CIRCUITS AND PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION OF LAW THAT REQUIRES RESOLUTION BY THIS COURT

A. *Conflict Among the Circuits*

The search of a house is "presumptively unreasonable" in the absence of a warrant. *Payton v. New York*, 445 U.S. 573 (1980). However, where both probable cause and exigent circumstances exist, a warrantless search is allowed. *United States v. Ramos*, ___F.2d___(11th Cir. 1991) (1991 WL 90721) (hot pursuit into defendant's home created exigency); *United States v. Burgos*, 720 F.2d 1520, 1525 (11th Cir. 1983). The court below found that the agents had probable cause to search Ackerson's home, and Petitioners assume *arguendo* that that was so. The issue in this case is whether the decision below that narcotics are a special class of evidence which because of their destructibility create a special type of "exigency," poses a conflict among the circuits and with other exigency decisions of this Court.

The en banc court below took the view that "the need to invoke the exigent circumstances exception to the warrant requirement is 'particularly compelling in narcotics cases' because narcotics can be so quickly destroyed." *United States v. Tobin*, 923 F.2d at 1510 (*quoting United States v. Young*, 909 F.2d 442, 446 (11th Cir. 1990)) Pet.App. 8. Thus, in the narcotics context the Eleventh Circuit has now adopted a test which is far more expansive than the definition of exigency used by this Court and by other circuits which require objective evidence of imminent or ongoing destruction of contraband before the warrant requirement can be avoided. In *Tobin*, the Eleventh Circuit applied a permissive "might be destroyed" test:

> The test of whether exigent circumstances exist is an objective one. *Id.* [*United States v. Young*, 909 F.2d 442 (11th Cir. 1990)] "'[T]he appropriate inquiry is whether the facts . . . would lead a reasonable, experienced agent to believe that evidence *might be destroyed* before a warrant could be secured.'" *Id.* (quoting *United States v. Rivera*, 825 F.2d 152, 156 (7th Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2d 492 (1987).

923 F.2d at 1510 (emphasis supplied). Pet. App. 8. The court applied that test and found that exigent circumstances existed – even before the agents approached the house – based on the mere "possibility" of removal or destruction of some portion of the narcotics.[1]. *Id.* at 1511. Pet. App. 9.

In contrast, *United States v. Salgado*, 807 F.2d 603, 609 (7th Cir. 1986), held that the mere possibility that evidence will be destroyed is not enough to create an exigency. Whether narcotics, as a special class of evidence, is exigency enough simply because destruction *might* occur, or is a mere *possibility*, has not been resolved by this Court.

In a recent case the Sixth Circuit discussed the conflict

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[1] During the surveillance, there were no other signs of exigency. The agents had no reason to believe that drug transactions were taking place in Ackerson's house or that the occupants were armed. The events took place in broad daylight, at a time when a warrant could have been obtained before Petitioners knew they were under observation. Even after Agent Roberts announced his presence, no sounds from within the house or facts of any kind suggested that an escape or destruction of evidence was occurring. In this case, assuming *arguendo* that the mere presence of narcotics and people in the house amounts to a *per se* exigent circumstance after police announce their presence, the agents indisputably created that situation by choosing the time to reveal their presence.

Thus, the decision below also conflicts with *United States v. Munoz-Guerra*, 788 F.2d 295 (5th Cir. 1986), which reversed based on similar facts, finding that officers impermissibly created the exigency upon which they relied for a warrant exception:

> [The agents] knew when they knocked on the patio door that, once having made their presence known to Munoz-Guerra (and possibly to other occupants) it would be necessary to conduct a security search of the premises and to restrain the condominium's inhabitants. *Warrantless entry was thus a foregone conclusion* the instant the agents revealed themselves to Munoz-Guerra at the patio door.

Id. at 298 (emphasis supplied); *see also United States v. Buchanan*, 904 F.2d 349, 355 (6th Cir. 1990) ("the agents created the exigency by approaching the house").

among the circuits and the unsettled nature of this issue:

> There are two major schools of thought with respect to whether the possible destruction of drugs constitutes an exigent circumstance in search warrant cases. One approach suggests that unannounced, forced entries to execute a search warrant are always reasonable in narcotics cases on the ground that narcotics violators are normally on the alert to destroy any contraband at the first notice of an officer's presence. *See United States v. Tracy*, 835 F.2d 1267 (8th Cir.), *cert. denied*, 486 U.S. 1014, 108 S.Ct. 1750, 100 L. Ed.2d 212 (1988). The second approach requires some other reason in addition to the fact that narcotics could be disposed of quickly. *See United States v. Allen*, 675 F.2d 1373, 1382 (9th Cir. 1980), *cert denied*, 454 U.S. 833, 102 S.Ct. 133, 70 L.Ed. 2d 112 (1981) (possibility of destruction of drugs plus other significant facts); *cf. Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963) (upheld search when officers suspected drugs could easily be destroyed and that Ker may have been expecting police as they had chased him earlier in the day).
>
> The Supreme Court has not yet decided whether the possible destruction of drugs, in and of itself, constitutes exigent circumstances in search warrant cases.

Hall v. Shipley, 932 F.2d 1147, 1151 (6th Cir. 1991).

Other decisions also illustrate the conflict, which this Court should resolve. The Second, Seventh and Eighth Circuits are in agreement with *Tobin*. *See United States v. Zabare*, 871 F.2d 282, 291 (2d Cir. 1987) (reasonable to conclude that destruction is imminent without extrinsic evidence of urgency); *United States v. Napue*, 834 F.2d 1311, 1326 (7th Cir. 1987) (evidence "might be" destroyed before warrant could be secured); *United States v. Tracy*, 835 F.2d 1267 (8th Cir.

1988).

The First and Third Circuits, like the Ninth in *United States v. Allen*, 675 F.2d 1373, 1382 (9th Cir. 1980), require more than the mere presence of narcotics to find exigent circumstances. *See United States v. Curzi*, 867 F.2d 36, 41 (1st Cir. 1989) ("great likelihood that evidence will be destroyed if there is a delay"); *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973) (warrantless search upheld in "emergency," when evidence "will be destroyed or removed" before a warrant could be obtained).

This case, which did involve narcotics but was devoid of facts indicating imminent or ongoing destruction of the contraband, presents the exigency issue squarely for this Court to resolve.

B. *Conflict with this Court's Decisions*

In contrast to the Eleventh Circuit's result in *Tobin*, this Court's application of the exigent circumstances warrant exception, albeit not necessarily in the drug context, has required an element of urgency.[2] A theoretical urgency is not enough:

> There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very

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[2] In the context of a seizure without a search, this Court has equated exigency with urgency:

> Where there are exigent circumstances in which police action literally must be *"now or never"* to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation.

Roaden v. Kentucky, 413 U.S. 496, 505 (1973) (emphasis supplied).

> convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was *threatened with removal or destruction...*

Johnson v. United States, 333 U.S. 10, 14-15 (1948) (emphasis supplied.)

Some of this Court's cases have viewed exigency as the ongoing destruction of evidence. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) ("in the process of destruction"); *Schmerber v. California*, 384 U.S. 757 (1966) (upholding a warrantless search of a person because blood-alcohol evidence was disappearing over time). Other cases have referred to "imminent," although not necessarily ongoing, destruction of evidence. *Minnesota v. Olson*, 495 U.S.___, 110 S.Ct. 1684, 1690 (1990); *United States v. Jeffers*, 342 U.S. 48, 52 (1951). But none of this Court's cases have allowed an exception to the warrant requirement based on exigent circumstances when the facts suggested only that the evidence "might" be destroyed.

In the present case, no facts could support a finding that the evidence in Ackerson's garage was being destroyed or was about to be destroyed. Viewing the facts in the light most favorable to the government, the agents suspected that three large tubular bags of narcotics were inside, and they knew that two persons and possibly three (based on another car parked outside) were inside. Only if the mere presence of people and large amounts of narcotics in a house creates a unique type of exigency would the decision below be consistent with the Fourth Amendment warrant requirement and with the decisions of this Court.[3] If more is needed to properly find

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[3]Such a position taken by the court below, impliedly presupposes a "narcotics exception," analogous to the "automobile exception." *See California v. Acevedo*,___ U.S.___, No. 89-1690, 59 U.S.L.W. 4559 (May 30, 1991). This Court has never suggested nor sanctioned such a doctrine.

exigent circumstances, as the Petitioners submit, the decision below is in conflict with *Johnson, Vale, Jeffers, Schmerber,* and *Olson*.

The line of cases including the en banc opinion below, which finds exigent circumstances without objective evidence of imminent destruction of contraband, opens the door to innocent citizens' homes, contrary to the foundation of the Fourth Amendment. This Court should resolve the conflict on this important issue by granting certiorari to determine what the standard for a warrantless search should be when narcotics are suspected to be in an occupied home.

II.
THE DECISION BELOW CONFLICTS WITH *SCHNECKLOTH V. BUSTAMONTE, JOHNSON V. UNITED STATES, FLORIDA V. BOSTICK* AND CIRCUIT COURT DECISIONS FINDING NO VOLUNTARY CONSENT TO SEARCH FOLLOWING A SHOW OF AUTHORITY BY POLICE

The court below found that consent was an alternate ground justifying the warrantless search of Ackerson's house, even if probable cause and exigent circumstances did not exist prior to the door opening. A consensual search is a legal search even in the absence of probable cause and a warrant. That consent must be voluntary to be valid, and voluntariness is judged under the "totality of the circumstances" test. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Consent is invalid if it is "the product of duress or coercion, express or implied." *Id.* at 227. When consent is obtained by officials under a "show of official authority," voluntariness is absent and a subsequent search violates the Fourth Amendment. *United States v. Edmondson*, 791 F.2d 1512, 1515 (11th Cir. 1986).

While acknowledging these principles, the decision below found consent and an exception to the warrant requirement, in the face of a clear show of authority by the Customs agents at Ackerson's door. Three agents in three cars drove up to

Ackerson's house; one waited with his gun drawn by the garage, while two knocked on the door continuously for three or four minutes. Agent Roberts shouted repeatedly to Petitioners:

> I'm a police officer. I would like to talk to you, I need for you to come here.

Tobin, 923 F2d. at 1508 n. 1. Pet.App. 3.

Agent Widener, by the garage, testified as follows:

> I could hear Agent Roberts shouting, "Police officers! We want to talk to you!" He said it several times, both in English and in Spanish.

Tobin, 923 F.2d. at 1518. Pet.App. 23.

Both express and implied coercion were present, invaliing any consent when Ackerson opened the door, under the *Schneckloth v. Bustamonte* rule:

> [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

412 U.S. at 228.

Tobin is also in direct conflict with *Johnson v. United States*, 333 U.S. 10 (1948) on this issue. *Johnson* found that a defendant who opened a hotel door "in submission to authority rather than as an understanding and intentional waiver of a constitutional right," did not consent in a way that averted the need for a warrant. *Id.* at 13. The agents' words in *Johnson* were like those in the present case:

> They knocked and a voice inside asked who was there. "Lieutenant Belland," was the reply. There was a slight delay, some "shuffling or noise" in the room and then the defendant opened the door. The officer said, "I want to talk to you a little bit."

Id. at 12. The lack of *words* of authority or demand did not remove the overall *show* of authority in this Court's view in *Johnson*. Similarly, the words in *Tobin* do not detract from

the ongoing show of authority at Ackerson's door, given the totality of the circumstances. The cases, and their differing results, are irreconcilable.

The decision below also conflicts with this Court's recent decision in *Florida v. Bostick*,___U.S.___(1991 WL 105224 (June 20, 1991)). There, speaking of "seizures," the Court posed the Fourth Amendment inquiry this way: "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter . . . ." *Bostick* involved a passenger on a public bus who was advised of his right to refuse a search of his luggage. In this case, the owner and occupant of a private home were faced with three to four minutes of knocking and shouts by armed officers: "Police officers. We want to talk to you." "I'm a police officer, I would like to talk to you. I need for you to come here." One officer had his hand on his holstered gun; another, standing to the side, had his gun drawn. *Bostick* asked whether:

> . . . taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable [innocent] person that he was not at liberty to ignore the police presence and go about his business."

Bostick, 1991 WL 105224, p.5. Would any reasonable, innocent homeowner feel free to decline the officers' requests or terminate the encounter by shouting through the door: "Go away!"? Only this Court can answer the question of whether the decision below is consistent with this Court's Fourth Amendment jurisprudence.

Bostick's admonition that "those who fight [the war on drugs] must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime" must mean that three to four minutes of armed police knocking at one's door, shouting their need to talk to a homeowner, cannot be lightly converted to "consent" to open the door. The decision below, which essentially concluded that a reasonable person would feel "free to deny that request or alternatively

talk to the agent through the closed door," 923 F.2d at 1512. Pet. App. 12, is unrealistic, and in Fourth Amendment *Bustamonte-Bostick* terms, unreasonable.

Ackerson's act in opening the door, in response to adamant continuing shouts by Customs agents, was acquiescence to their authority, not voluntary consent. *See Bumper v. North Carolina*, 391 U.S. 542, 549 (1968). The decision below conflicts with *United States v. Shaibu*, 920 F.2d 1423 (9th Cir. 1990), where acquiescence was distinguished from consent. Shaibu met police outside his apartment door, and walked back inside leaving the door opened. The police followed, without a warrant, and Shaibu did not explicitly object. Noting the paramount expectation of privacy in one's home, the Ninth Circuit refused to infer consent from Shaibu's acquiescent conduct. In contrast, the Eleventh Circuit inferred consent when Ackerson opened his door.

The decision below thus conflicts with established precedent from this Court and other circuits. Certiorari should be granted to review the application of the law of consent to this case.

III.

THE DECISION BELOW PRESENTS THE IMPORTANT BUT UNANSWERED QUESTION OF WHETHER THE EN BANC COURT HAD JURISDICTION TO REVERSE THE PANEL DECISION GRANTING ACKERSON COMPLETE RELIEF, SINCE ONLY TOBIN PETITIONED FOR REHEARING EN BANC AND THE GOVERNMENT DID NOT CROSS-PETITION.

The en banc court recognized the issue it created by granting *Tobin*'s rehearing en banc, and then reversing Ackerson's panel victory despite the fact that the government did not file a cross-petition with regard to Ackerson:

> The government did not file a cross-petition [in

> response to Tobin's]. Ackerson, who had already obtained complete relief, did not join in Tobin's petition. On May 16, 1990, we vacated the entire panel opinion and granted rehearing en banc.

923 F.2d at 1509. Pet.App. 6.

Thus the en banc court granted relief to the government, even though the government did not seek relief from Ackerson's favorable ruling. The en banc opinion leaves no doubt that its genesis was Tobin's suggestion for en banc reconsideration, not the court's or the government's. The court could have initiated en banc rehearing on its own motion (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 35, Internal Operating Procedures 4), but it did not do so.

Ackerson lost the benefit of his favorable judgment contrary to Rule 35(b), Federal Rules of Appellate Procedure, even though no party suggested the need for rehearing of the relief granted to him. Just as a party cannot advance an argument which would modify a judgment unless a cross-petition for writ of certiorari has been filed, *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.4 (1985), a court should not modify a judgment unless a cross-petition is filed, or the court's own procedures for *sua sponte* modification are followed.

Due process of law requires that Ackerson receive the benefit of compliance with the Rules of Appellate Procedure. The failure to do so in this case presents the important but unanswered question of whether an en banc court can reverse a panel decision where neither the losing party (the government) nor the court itself initiates the en banc process.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ronald TOBIN, Clifford Roger Ackerson
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ronald TOBIN, Defendant-Appellant.

Nos. 87-6015, 88-5274.

United States Court of Appeals,
Eleventh Circuit.

Feb. 21, 1991.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, COX, BIRCH and DUBINA, Circuit Judges, and HENDERSON*, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case arises from the district court's denial of co-defendants Ronald Tobin's and Clifford Ackerson's motions to suppress evidence seized in a search of Ackerson's home, garage, and a station wagon parked in the garage. A panel of this Court reversed the district court's finding that the

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*Senior Circuit Judge Albert J. Henderson elected to participate in this decision, pursuant to 28 U.S.C.A. § 46(c).

search was permissible under the Fourth Amendment and held that Ackerson's motion should have been granted. The panel, however, affirmed the district court's denial of Tobin's motion, holding that Tobin did not have standing to contest the legality of the search. We vacated the panel's opinion and now affirm en banc the district court's denial of both motions to suppress.

I. STATEMENT OF THE CASE

A. *Factual Background*

The facts of this case are extensively reported in the panel's opinion. *United States v. Tobin*, 890 F.2d 319 (11th Cir.1989), *reh'g granted and opinion vacated*, 902 F.2d 821 (11th Cir. 1990). We therefore give only the following brief summary.

On March 19, 1986, two United States Customs agents and two Drug Enforcement Administration agents were conducting a surveillance unrelated to the instant case in a residential neighborhood in Miami. The agents watched the neighborhood from a field located northwest of the front of defendant Clifford Ackerson's house. Around 3:30 in the afternoon, one of the agents noticed a Mercury Marquis abruptly stop in front of Ackerson's house and back into the driveway. The agents began watching the activity through binoculars. Defendant Ronald Tobin got out of the car, looked around, ran to the front door, knocked, and was admitted within one minute. Shortly thereafter, Ackerson lifted the garage door three-quarters of the way up, looking up and down the street as he held the door. Tobin emerged and unlocked the trunk of the Mercury. He removed three clear plastic tubular bags, each approximately four feet long. According to one agent's testimony, smaller bundles were visible inside the bags. Tobin quickly put the bags in the garage. While the garage door was open, the agents observed a station wagon parked inside. A third vehicle, a pickup truck, was parked in the front yard.

Believing that the tubular bags contained cocaine, three of the agents decided to go to the door and talk to the occupants of the house. The fourth agent remained at the surveillance post. The three agents pulled up in front of the house in their individual unmarked vehicles. One went to the door; another accompanied the first as security backup; the third went to the corner of the house near the garage to stand out of sight.

The first agent knocked and received no answer. He continued knocking for three to four minutes, calling out in English and Spanish.[1] Ackerson opened the door. The agent showed him his credentials, told him he wanted to talk to him about the car in the driveway, and explained that he believed someone had put cocaine in his garage. Ackerson denied that anyone had recently backed into the driveway and stated that no one else was in his home. The agent smelled marijuana coming from inside the house as they spoke Ackerson eventually called Tobin to the door. Tobin denied having driven the car there. When the agent explained all he had observed, Tobin continued to deny it.

The agent then told the two men that he thought they should all go to the garage and see what was there. Ackerson turned and walked inside the house in the direction of the garage. The agent followed him into the house. Tobin and the backup agent followed to the rear. When they got to the garage, the first agent asked Ackerson to open the outside garage door. He moved around the station wagon and opened it. The third agent, standing outside on the driveway, looked into the garage and spotted the tubular bags on the floor. One of the bags had been opened. The agent could see that it contained cocaine. The agents then placed Ackerson and Tobin under arrest. The agents did a security sweep of the house and discovered three bales of marijuana in the shower stall

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[1] Though the district court did not make a specific factual finding as to what was said, the agent testified at the suppression hearing that the words he used were, "I'm a police officer, I would like to talk to you, I need for you to come here."

of the bathroom connected to the master bedroom. One of the agents also noticed through the windows of the station wagon in the garage that the screws had been removed from the floorplate over the wheel well in the rear of the vehicle. Upon opening the back of the vehicle and lifting up the wheel well cover, the agent found grocery bags full of cash, totalling $775,000.

B. *Procedural History*

1. *The District Court*

Ackerson and Tobin were charged with conspiracy and possession with intent to distribute cocaine in violation of 21 U.S.C.A. §§ 841(a)(1) & 846 and 18 U.S.C.A § 2. Ackerson alone was charged with possession with intent to distribute marijuana in violation of 21 U.S.C.A. § 841(a)(1).

Both defendants filed motions to suppress the fruits of the searches. After holding a hearing on the motions, the magistrate recommended that the district court grant both motions to suppress, finding that the searches were illegal and that Tobin as well as Ackerson had standing to contest the searches.

After the government objected to the magistrate's report, the district court held a *de novo* hearing on the standing issue. The court subsequently entered an order denying both motions to suppress, holding that, based on the magistrate's findings, the search of the garage and protective sweep of the house were legal and that neither defendant had standing to contest the search of the station wagon because both had denied ownership of it. The court was thus not required to address Tobin's standing as to the house and garage, though it commented that the evidence adduced at the hearing did not support a finding that Tobin had a privacy interest in the house or garage to which Fourth Amendment protections could attach.

Tobin and Ackerson thereafter entered plea agreements

with the government whereby they would both plead guilty to possession with intent to distribute cocaine, reserving the right to appeal the denial of their motions to suppress and to withdraw the guilty pleas if they prevailed. They subsequently pled guilty pursuant to the agreement. The court sentenced both defendants to terms of fifteen years in prison and fines of $100,000. Both defendants remained free on bond pending the appeal.

2. *The Panel*

The panel reversed the district court's denial of Ackerson's motion to suppress, but affirmed the denial of Tobin's motion. *Tobin,* 890 F.2d at 332. In the panel's view, the search of the house violated the Fourth Amendment. The panel noted that the magistrate and district court had found that the agents had reasonable suspicion of criminal activity when they approached the house.[2] This suspicion alone did not, in the panel's opinion, justify detaining and questioning the occupants under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), as the district court had opined, because *Terry* does not apply to dwellings. The key issue then, according to the panel, was whether the agent's conduct at the door of the house, which afforded him the opportunity to smell the marijuana, precipitated an impermissible search to which Ackerson did not consent.

The panel stated that a police officer's approach to a criminal suspect's house to make general inquiries is not a search as long as the door is not opened in response to a threat or command. *United States v. Knight,* 451 F.2d 275, 278 (5th Cir.1971), *cert. denied,* 405 U.S. 965, 92 S.Ct. 1171, 31 L.Ed.2d 240 (1972). Because in its view the agent's conduct at the door amounted to a demand of entry under color of authority, however, the panel found the opening of the door to be a

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[2] The magistrate described the agents' suspicion at this point as "More than mere suspicion, but less than probable cause."

search to which Ackerson could not have consented. The olfactory access to the house which the agent gained pursuant to the opening of the door was therefore illegal. The searches which followed were consequently tainted. The panel also found, however, that Tobin did not have standing to assert the Fourth Amendment violation. Consequently, the evidence uncovered in the search was admissible against him.

3. *Rehearing En Banc*

Tobin then filed a petition for a rehearing and a suggestion for rehearing en banc on the standing issue. The government did not file a cross-petition. Ackerson, who had already obtained complete relief, did not join in Tobin's petition. On May 16, 1990, we vacated the entire panel opinion and granted rehearing en banc. At en banc oral argument, the parties argued both the issue of standing and the issue of the search's legality. It is not necessary to the outcome of this case, however, that we reach the standing issue. For the purposes of the following discussion, we assume, but do not hold, that the parties have standing to raise the question of the search's legality.

II. ANALYSIS

[1] Review of a district court's denial of a motion to suppress evidence is a mixed question of law and fact. *United States v. Alexander,* 835 F.2d 1406, 1408 (11th Cir.1988). The district court's findings of fact are reviewed under the clearly erroneous standard, whereas its application of the law to those facts is subject to *de novo* review. *Id.* In reviewing the district court's ruling, this Court must construe the facts in the light most favorable to the party prevailing below, *i.e.,* here the government. *United States v. Wilson,* 894 F.2d 1245, 1254 (11th Cir.) *cert. denied,* — U.S. —, 110 S.Ct. 3284, 111 L.Ed.2d 792 (1990).

[2] The warrantless search of a home is "presumptively unreasonable." *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980). A warrantless search

is allowed, however, where both probable cause and exigent circumstances exist. *United States v. Burgos*, 720 F.2d 1520, 1525 (11th Cir.1983).

A. *The Agent's Approach to the House*

1. *Probable Cause*

[3] The magistrate and district court found that the agents had reasonable suspicion of criminal activity at the time they made their observations through binoculars from the field. Probable cause, in the district court's view, did not arise until the agent, while standing at the door, smelled the marijuana. The government did not contest this finding.

The question of what amounts to "probable cause is purely a question of law and hence is subject to plenary review by this court." *United States v. Hurtado*, 779 F.2d 1467, 1477 (11th Cir.1985). Probable cause exists when under the "totality-of-the-circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). In other words, probable cause exists "where the facts lead a reasonably cautious person to believe that the 'search will uncover evidence of a crime.'" *United States v. Burgos*, 720 F.2d at 1525 (quoting *United States v. Rojas*, 671 F.2d 159, 165 (5th Cir. Unit B 1982)).

Prior to their approach to the house, the agents observed the defendants behave suspiciously, look about furtively, and quickly transfer into the garage tubular bags which contained smaller bundles. In view of these facts, the agents could reasonably have concluded that a search would uncover evidence of a crime. Because there was a "fair probability" that cocaine would be found in the garage, it appears that the agents had probable cause to search even prior to their approach to the house.

2. *Exigent Circumstances*

[4] To justify a warrantless search, however, there must also

exist exigent circumstances in addition to probable cause. *Burgos,* 720 F.2d at 1525. This Circuit has held that the "presence of contraband without more does not give rise to exigent circumstances." *United States v. Torres,* 705 F.2d 1287, 1297 (11th Cir.), *vacated and remanded on other grounds,* 718 F.2d 998 (11th Cir.1983). An exigent situation may arise, however, when there is danger that the evidence will be destroyed or removed. *Burgos,* 720 F.2d at 1526. *See also United States v. Standridge,* 810 F.2d 1034, 1037 (11th Cir.) (listing several factors indicating existence of exigent circumstances), *cert. denied,* 481 U.S. 1072, 107 S.Ct. 2468, 95 L.Ed.2d 877 (1987). This Court has held that the need to invoke the exigent circumstances exception to the warrant requirement is "paticularly compelling in narcotics cases" because narcotics can be so quickly destroyed. *United States v. Young,* 909 F.2d 442, 446 (11th Cir.1990). The test of whether exigent circumstances exist is an objective one. *Id.* "'[T]he appropriate inquiry is whether the facts . . . would lead a reasonable, experienced agent to believe that evidence might be destroyed before a warrant could be secured.'" *Id.* (quoting *United States v. Rivera,* 825 F.2d 152, 156 (7th Cir.), *cert. denied,* 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2d 492 (1987).

Prior to their approach to the house, the agents had probable cause to believe that narcotics were in the garage or the house and knew that at least two persons were in the house. They also knew that there were three vehicles on the premises, a fact which raises the possibility that there were more than two persons inside the house. The presence of the vehicles also permits the inference that the suspects might depart with or without the narcotics even before the agents could reach the house.

[5] Circumstances are not normally considered exigent where the suspects are unaware of police surveillance. *Torres,* 705 F.2d at 1297; *United States v. Cravero,* 545 F.2d 406, 414-15 n. 24 (5th Cir.1976), *cert. denied,* 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). This Circuit has held, moreover,

that a warrantless search is illegal when police possess probable cause but instead of obtaining a warrant create exigent circumstances. *See United States v. Scheffer,* 463 F.2d 567, 575 (5th Cir.), *cert. denied,* 409 U.S. 984, 93 S.Ct. 324, 34 L.Ed.2d 248 (1972); *see also United States v. Munoz-Guerra,* 788 F.2d 295, 298 (5th Cir.1986) (holding that where agents can get a warrant instead of revealing themselves and making immediate entry a foregone necessity, a warrantless search must be deemed unreasonable); *but see United States v. MacDonald,* 916 F.2d 766 (2d Cir.1990) (in holding a warrantless search valid where police had probable cause but precipitated the exigent circumstances by approaching the dwelling and knocking, the court stated, "The fact that the suspects may reasonably be expected to behave illegally does not prevent law enforcement agents from acting lawfully to afford the suspects the opportunity to do so. Thus, assuming arguendo that there were no exigent circumstances before the knock, the agents' conduct did not impermissibly create the circumstances occurring thereafter."). It should be noted, on the other hand, that "[l]aw enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Hoffa v. United States,* 385 U.S. 293, 310, 87 S.Ct. 408, 417, 17 L.Ed.2d 374 (1966).

In the instant case, the agents could reasonably conclude from the defendants' hurried actions and furtive looks that the defendants were either aware or afraid that someone was watching them.[3] Destruction or removal of some portion of the narcotics was therefore a possibility. Construing the facts in a light most favorable to the government, the prevailing party below, it therefore appears that there existed exigent circumstances which would permit a warrantless search even prior to the approach to the house.

[3] One of the agents did, however, state at the suppression hearing before the magistrate that he did not believe that the defendants noticed him as he watched the activity through the binoculars at the surveillance post.

B. *Approach to the House*

[6] Assuming *arguendo* that the agents' observations considered in the totality of the circumstances did not immediately give rise to the necessary level of probable cause and exigent circumstances, the warrantless search should still be deemed justifiable. The district court, the panel, and all parties agreed that based upon the binocular observations, the agents had, at a minimum, reasonable suspicion that criminal activity was afoot. Reasonable suspicion cannot justify the warrantless search of a house, *see Arizona v. Hicks*, 480 U.S. 321, 328, 107 S.Ct. 1149, 1154, 94 L.Ed.2d 347 (1987), but it can justify the agents' approaching the house to question the occupants. *Knights*, 451 F.2d at 278; *Davis v. United States*, 327 F.2d 301, 303 (9th Cir.1964) (stating "[a]bsent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof–whether the questioner be a pollster, a salesman, or an officer of the law.").

[7] There is no doubt that the agent's suspicions rose to the level of probable cause when, as the door stood open, he detected what he knew from his law enforcement experience to be the odor marijuana.[4] *United States v. Lueck*, 678 F.2d 895, 903 (11th Cir.1982). Moreover, the defendants and anyone else who might have been present in the house would have been aware of the agent's suspicions at that moment. Danger that the defendants or someone else inside the house might destroy the evidence thus provided the exigent circumstances required to justify a warrantless search. *Burgos*, 720 F.2d at 1526.

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[4]The agent who first noticed the aroma of marijuana at the door testified at the suppression hearing that he had been in law enforcement for "[a]bout ten, eleven years." He had worked with the Customs Service for three years prior to the events involving this case. During the two years prior to these events, he had been involved in eleven narcotics seizures in the Miami area.

Consequently, if the agents possessed only reasonable suspicion at the time of their oservations and approached the house legally under *Knight* to speak with its occupants in order to dispel the suspicion, the search can be found illegal only if Ackerson's opening of the door was not consensual. *United States v. Edmondson,* 791 F.2d 1512, 1514 (11th Cir.1986).[5]

[8] The voluntariness of consent must be judged in light of the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973). If the circumstances indicate that Ackerson opened the door in response to a "show of official authority," then Ackerson cannot be deemed to have consented to the agent's obtaining the olfactory evidence indicating the presence of marijuana. *Edmondson,* 791 F.2d at 1515. The relevant facts appear to be that the agent, with a backup officer standing behind him, knocked continuously for three to four minutes, calling out to the occupants. The agents were in plain clothes. Though they were armed, they did not display their weapons.

Whether the consent is deemed involuntary depends upon the amount of threat presented. On the one hand, cases in which police have used their position to demand entry have held that consent was not voluntary and thus have required suppression of evidence discovered pursuant to entry. *Bumper v. North Carolina,* 391 U.S. 543, 548, 88 S.Ct. 1788, 1791-92, 20 L.Ed.2d 797 (1968) (holding that entry and search was not consensual when consent was given only after police stated that they possessed a warrant); *Edmondson,* 791 F.2d at 1515 (holding that entry was not consensual when consent was given only after agent with weapon drawn shouted, "FBI. Open up."). On the other hand, consent to enter has been held voluntary where the agent first telephoned and

[5] The district court did not have occasion to address the issue of consent. However, as the panel pointed out, where the record is adequate, the district court's failure to address the issue of consent does not prevent the appellate court from passing on it. *Tobin,* 890 F.2d at 328; *see also United States v. Newbern,* 731 F.2d 744, 748 (11th Cir.1984) (appellate court first to address consent issue).

requested an interview, and the defendant agreed, subsequently opening the door when the agent knocked and identified himself by showing his credentials. *United States v. Willis*, 759 F.2d 1486, 1493 & 1498 (11th Cir.), *cert. denied*, 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985).

The facts of the instant case fall much closer to those of *Willis* than those of *Bumper* or *Edmondson*. In calling out to the occupants of the house, the agent did not use the imperative as did the officer in *Edmondson*. On the contrary, he phrased his words in the form of a request. The occupants were free to deny that request or alternatively talk to the agent through the closed door. The decision to open the door was therefore voluntary. Consequently, Ackerson may be deemed to have consented to the agent's smelling of the marijuana which gave rise to the probable cause needed to do a warrantless search if that probable cause did not previously exist.[6]

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[6]The panel found the instant case analogous to the former Fifth Circuit case of *Pekar v. United States*, 315 F.2d 3319 (5th Cir.1963). The panel's reliance on that case, however, was misplaced. There two FBI agents knocked on the door of the defendant's hotel room. When the defendant asked "Who is there?", the agents identified themselves and said they wanted to talk to the defendant regarding an FBI investigation. The defendant did not respond. The agents waited ten minutes and knocked again. The defendant asked for further identification. The agents displayed their credentials through the louvered door and were then admitted. The agents then conducted a full-blown search and twice tried to get the defendant to sign a consent to search form which the defendant refused to do. In holding the consent to enter and search involuntary, the court emphasized the defendant's refusal to sign the waiver and the agents' misleading the defendant into thinking they wanted to talk about an investigation perhaps unrelated to the defendant when they actually planned to search. *Id.* at 325. The panel's opinion thus distorted the *Pekar* court's reasoning by omitting discussion of these added factors.

The panel also found analogous *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). There officers smelled opium coming from a hotel room. The Court specifically stated that the officers at that point had probable cause. But instead of getting a warrant, the officers knocked, identified themselves, and said they wanted to talk. When the defendant opened the door, they immediately arrested her and conducted a search. The opinion states that entry was demanded and granted "under color of office," rather than "waiver of a constitutional right." *Id.* at 13, 68 S.Ct. at 368-69. However it is clear from the context that the Court's objection to the warrantless arrest and search was that there were no exigent circumstances present justifying the lack of a warrant. *Id.* at 14-15, 68 S.Ct. at 369-70 ("No suspect was fleeing . . . No evidence or contraband was threatened with removal or destruction."). Again, the panel opinion did not address this fact.

C. *Searches Subsequent to Entry*

[9-14] Because we find that warrantless entry into Ackerson's house justifiable, we hold the search of the garage and seizure of the cocaine to be permissible under the Fourth Amendment. Moreover, the protective sweep of the house subsequent to the arrests was also permissible. "The Fourth Amendment permists a properly limited protective sweep in conjunction with an in-home arrest when the search officer prossesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, — U.S. —, 110 S.Ct. 1093, 1099-1100, 108 L.Ed.2d 276 (1990). The fact that there were three vehicles on the scene coupled with Ackerson's lying about Tobin's presence clearly gave rise to a reasonable belief that someone else could be hiding in the house. The agents were, of course, free to seize any evidence they discovered in plain view within the proper scope of the protectice sweep. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 20922, 2037, 29 L.Ed.2d 564 (1971) ("Where the initial intrusion that brings the police within plain view of [contraband] is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is . . . legitimate."). Discovery and seizure of the marijuana in the shower stall was therefore legitimate.[7] Moreover, the search of the station wagon may be justified on the basis of the automobile exception. *United States v. Ross*, 456 U.S. 798, 807-808, 102 S.Ct. 2157, 2163-2164, 72 L.Ed.2d 572 (1982). The agent's sighting of the screws removed from the wheel well cover clearly gave rise to probable cause to

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[7] Testimony at the suppression hearing revealed that the agents also conducted a deeper warrantless search, looking into drawers and cabinets. The district court found this deeper search unjustifiable and suppressed the evidence it revealed. We agree with the district court's findings. *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969) ("There is no . . . justification . . . for routinely searching any room [incident to an arrest] other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well recognized exceptions, may be made only under authority of a search warrant.").

believe the wheel well contained contraband. The evidence of exigent circumstances need not be overwhelming to justify the warrantless search of an automobile. *Alexander*, 835 F.2d at 1409. Both Tobin and Ackerson denied ownership of the vehicle, indicating to the agent that the true owner could have arrived and driven the vehicle away, thus depriving the government of evidence if the agent did not act immediately. *See id.*

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Ackerson's and Tobin's motions to suppress the evidence found pursuant to the search of the garage, house, and station wagon.

CLARK, Circuit Judge, dissenting with respect to the reversal of Ackerson's conviction and concurring with respect to the result in Tobin's conviction based on his lack of standing as found in the panel opinion, in which COX, Circuit Judge, and HENDERSON, Senior Circuit Judge, join:

The issues in this case have changed their complexion considerably since the district court ruled upon the motions to suppress filed by Tobin and Ackerson. That court held that neither Tobin nor Ackerson had standing to urge a Fourth Amendment right; alternately, if standing existed, the result would be the same since the facts supported a *Terry* stop. The court found that the facts supported a reasonable suspicion to believe that criminal activity was afoot and that this suspicion supported the officers' entry into the house.

The panel agreed with the district court that Tobin had no standing, but reversed with respect to Ackerson's standing since he owned and lived in the house the officers entered. Without discussing whether the officers had reasonable suspicion, the panel concluded that the officers' entry into the house was coerced and that Ackerson had not voluntarily consented to their entry. The district court's ruling denying

Ackerson's motion to suppress was reversed.

The majority *en banc* opinion does not discuss standing. The majority decides that the entry into the house comported with Fourth Amendment law and that the ensuing search of the house by the officers was lawful. The district court's ruling not to suppress the evidence was affirmed. The majority holds that the activities of the defendants viewed by the officers through their binoculars supported a conclusion by the officers of probable cause to support a search of the house. The majority further reasons that there were exigent circumstances that excused the officers from the requirement that a warrant be obtained. The majority then assumes arguendo that there was no probable cause and reasons alternatively that the entry into the house by the officers was consensual.

Because I believe under the facts of this case there were no exigent circumstances except those created by the officers themselves, and because I believe the panel opinion was correct in holding that the entry by the officers was coerced, I respectfully dissent.

I. EXIGENT CIRCUMSTANCES

Assuming arguendo that probable cause existed, that alone is not sufficient to justify a warrantless search; "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment–subject only to a few specifically established and well-delineated exceptions."[1]

The exigent circumstance exception invoked by the majority is that "[d]estruction or removal of some portion of the narcotics was . . . a possibility."[2] The majority concedes that no evidence was introduced to show that the contraband was in danger of being destroyed, and indeed one agent testified

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[1] *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (footnotes omitted).

[2] Majority opinion, at 1511.

that he did not believe that the officers had been observed during their surveillance.[3] instead, the majority holds that the "imminent destruction" exception to the warrant requirement was triggered because the appellants acted clandestinely in transferring the packages of cocaine from the car to the garage. This holding contradicts both the facts of this case and previous case law.

The Supreme Court has repeatedly required the suppression of evidence seized without a warrant when there was no indication that the evidence was about to be destroyed.[4] The Court confronted very similar circumstances to those at issue in *Johnson v. United States*.[5] There, police oficers were informed that unknown persons were smoking opium in a Seattle hotel. The officers entered a hallway and

> recognized at once a strong odor of burning opium which to them was distinctive and unmistakable. The

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[3] Majority opinion, at 1511 n. 3.

[4] *See generally Minnesota v. Olson*, — U.S. —, 110 S.Ct. 1684, 1690, 109 L.Ed.2d 85 (1990) (approving Minnesota court's finding of no exigent circumstances for warrantless entry to arrest); *Mincey v. Arizona*, 437 U.S. 385, 390-95, 98 S.Ct. 2408, 2412-14, 57 L.Ed.2d 290 (1978) (no exigent circumstances to justify warrantless, four-day search of residence of arrested suspect); *Vale v. Louisiana*, 399 U.S. 30, 34-35, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970) (arrest on steps in front of home did not create exigent circumstances for warrantless search); *Chapman v. United States*, 365 U.S. 610, 613-18, 81 S.Ct. 776, 778-80, 5 L.Ed.2d 828 (1961) (no exigent circumstances where officer searched rented-but-vacant property with permission of the owner); *Jones v. United States*, 357 U.S. 493, 497-500, 78 S.Ct. 1253, 1256-58, 2 L.Ed.2d 1514 (1958) (no exigent circumstances where evidence of ongoing illegal distilling operation perceived from outside dwelling); *United States v. Jeffers*, 342 U.S. 48, 52, 72, S.Ct. 93, 95, 96 L.Ed.59 (1951) (no exigent circumstances where police searched vacated hotel room; "There was no question of violence, no movable vehicle was involved, nor was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized. In fact, the officers admit they could have easily prevented any such destruction or removal by merely guarding the door."); *MacDonald v. United States*, 335 U.S. 451, 454-56, 69 S.Ct. 191, 192-93, 93 L.Ed. 153 (1948) (no exigent circumstances where police had illegal gamblers under surveillance for two months); *Trupiano v. United States*, 334 U.S. 699, 709, 68 S.Ct. 1229, 1234, 92 L.Ed. 1663 (1948) (no exigent circumstances "where there was an abundant opportunity to obtain a search warrant and to proceed in an orderly, judicial way"); *Taylor v. United States*, 286 U.S. 1, 5-6, 52 S.Ct. 466, 467, 76 L.Ed. 951 (1932) (no exigent circumstances where odor alerted police to presence of alcohol in garage).

[5] 333 U.S. 10], 68 S.Ct. 367, 92 L.Ed. 436 (1948).

> odor led to Room 1. The officers did not know who was occupying that room. They knocked and a voice inside asked, who was there. "Lieutenant Belland," was the reply. There was a slight delay, some "shuffling or noise" in the room and then the defendant opened the door. The officer said, "I want to talk to you a little bit." She then, as he describes it, "stepped back acquiescently and admitted us." He said, "I want to talk to you about the opium smell in the room here." She denied that there was such a smell. Then he said, "I want you to consider yourself under arrest because we are going to search the room."[6]

From this, the Court held that no consent to search was given, and that no exigent circumstances justified the warrantless search:

> No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with remova or destruction, except perhaps the fumes which we suppose in time will disappear. But they were not capable at any time of being reduced to possession for presentation to court.[7]

The majority circularly opines that *Johnson* is inapposite because, in that case, no exigent circumstances were present.[8] Yet here, as in *Johnson*, no reason beyond inconvenience has been proffered as to why a search warrant was not obtained. As in *Johnson*, no suspect was fleeing, likely to take flight,

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[6] 333 U.S. at 12, 68 S.Ct. at 368.

[7] 333 U.S. at 15, 68 S.Ct. at 369.

[8] Majority opinion, at 1512 n. 6.

or even aware that there was any reason to flee. As in *Johnson*, the officers meant to search a permanent place of residence, not an automobile. And, as in *Johnson*, the evidence–four large, tubular bags of cocaine–was not threatened with removal or destruction. If appellants started to move the cocaine, the officers easily could have detected this through their surveillance and stopped the relocation. By all accounts, the appellants believed they had successfully secreted their cache in the garage, and there was no evidence that they were about to dispose precipitously of the goods. *Johnson* and the instant case are indistinguishable. The majority would hold, were it to decide *Johnson* today, that the defendant was acting furtively by keeping her hotel room door shut.

As the majority discusses, prior decisions of the Supreme Court and of this court hold that exigent circumstances may arise when evidence is likely to be destroyed. Regardless of the ease of destructibility of evidence, if there is no indication that evidence is in danger of being lost, there is no reason for the police to circumvent the Fourth Amendment's warrant requirement. The most delicate scintilla of evidence will last indefinitely if no one has an incentive to destroy it. In the circumstances of this case, the appellants would have been most loathe to destroy their extremely valuable store of cocaine and money absent some evidence known to them of police surveillance.

Where suspects are unaware of police surveillance, the majority correctly notes that exigent circumstances do not usually exist.[9] For example, in *United States v. Torres*,[10] the police searched a house, the entrance of which was strewn with marijuana leaves; a van parked nearby contained bales of marijuana. The court found no exigent circumstances, however, because

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[9] Majority opinion, at 1511.

[10] 705 F.2d 1287 (11th Cir.) *vacated and remanded on other grounds*, 718 F.2d 998 (11th Cir.1983).

> [t]he presence of contraband without more does not give rise to exigent circumstances. It is improbable that the appellants could have concealed or destroyed the 200 pounds of marijuana found in the house before the agents moved in. Had appellants attempted such a course of action exigent circumstances would have been presented. The agents, however, had no reason to speculate that the evidence was being destroyed or that it was even subject to that risk.[11]

The logical corollary of the notion that exigent circumstances do not exist where suspects are unaware of surveillance is that such circumstances do not exist where the police purposefully make suspects aware of surveillance. Clearly, the police involved in this case controlled the time at which the approach to the house took place, thus creating the exigent circumstances for their search.[12]

In evaluating the creation of exigent circumstances by police, courts in the past have looked to whether there was an opportunity to obtain a search warrant. In *United States v. Scheffer*,[13] this court wrote that "we have carefully reviewed the record and there is simply no plausible explanation as to why customs officials failed to go before a magistrate and obtain a search warrant."[14] As the majority notes, the *Scheffer* court found that police creation of exigent circumstances cannot excuse the failure to obtain a warrant. In *United States v. Munoz-Guerra*,[15] this court's twin circuit held that

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[11] *Id.* at 1297.

[12] *See United States v. Duchi*, 906 F.2d 1278 (8th Cir.1990) (holding that evidence must be suppressed where the police created the exigency that the suspect would open a tampered package and immediately destroy the evidence); *United States v. Thompson*, 700 F.2d 944, 950 (5th Cir.1983) (government cannot create exigent circumstances) (citing cases); *United States v. Scheffer*, 463 F.2d 567, 575 (5th Cir.) (no exigent circumstances where "agents . . . actually planned the cocaine transfer and could have controlled the time at which it took place."), *cert. denied*, 409 U.S. 984, 93 S.Ct. 324, 34 L.Ed.2d 248 (1972).

[13] 463 F.2d at 567.

[14] *Id.* at 575.

[15] 788 F.2d 295 (5th Cir.1986).

incriminating evidence must be suppressed when police, having received a tip that an armed drug dealer lived in a certain condominium, created exigent circumstances by approaching a door of the residence. The Fifth Circuit wrote,

> In the instant case, it was possible to secure the condominium covertly from the outside. There was no basis, on these facts, for believing that resort to a magistrate would have created risks of a greater magnitude than those which are present in any case where the police have probable cause but delay entry pending receipt of a warrant. Had the police's necessary efforts to secure the premises been visible to the inhabitants or had there been reason to believe that someone within the condominium was in need of immediate succor, the government's position would have merit.[16]

After the agents knocked on the door of Ackerson's home, the agents had to search the house, with or without consent, or risk the possible destruction of the evidence. As the *Munoz-Guerra* court commented:

> [The agents] knew when they knocked on the patio door that, once having made their presence known to Munoz-Guerra (and possibly to other occupants), it would be necessary to conduct a security search of the premises and to restrain the condominium's inhabitants. Warrantless entry was thus a foregone conclusion the instant the agents revealed themselves to Munoz-Guerra at the patio door.[17]

The constitutional error in this case is magnified by the ease with which the agents could have complied with the Fourth Amendment's warrant requirement, assuming as the majority does that there was probable cause. The agents

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[16] *Id.* at 298; *see also United States v. Curzi*, 867 F.2d 36, 43 (1st Cir. 1989) (invalidating warrantless search involving creation of exigent circumstances analogous to those in *Munoz-Guerra*).

[17] 788 F.2d at 298.

clearly had the option of unobtrusively securing the boundaries of the house while a warrant was procured–one of the agents testified that they were in possession of a two-way radio at the time of the search.[18] The federal Rules of Criminal Procedure authorize the issuance of telephonic warrants.[19] If any of the suspects left prior to the issuance of the warrant, they could have been detained, and if they possessed any of the contraband, arrested.[20] And if some of the suspects were arrested and others remained in the house, that would have provided the exigent circumstances necessary to trigger an exception to the warrant requirement.

The Supreme Court has held that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests."[21] Given that the suspects were completely unaware of the surveillance, the police have failed to carry their burden of showing the existence of such an urgent need.

II. NONCONSENSUAL ENTRY

Barring exigent circumstances, the police may conduct a warrantless search of a residence only when they have the freely given consent of the occupants. The Supreme Court in *Bumper vs. North Carolina*[22] held that "[w]here there is coercion there cannot be consent,"[23] and "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a

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[18] Record on Appeal, vol. 4, at 26.

[19] *See* Fed.R.Crim.P. 41(c)(2); *see also United States v. Cuaron*, 700 F.2d 582, 588-89 (10th Cir.1983) (court must consider availability of telephonic warrant in exigent circumstances determination).

[20] *See Segura v. United States*, 468 U.S. 796, 809-10 & n. 7, 104 S.Ct. 3380, 3387-88 & n. 7, 82 L.Ed.2d 599 (1984) (Burger, C.J. & O'Connor, J.) (commenting favorably on the pratice of securing the boundaries of a home while obtaining a warrant to search).

[21] Welsh v. Wisconsin, 466 U.S. 740, 749-50, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732 (1984).

[22] 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

[23] 391 U.S. at 550, 88 S.Ct. at 1792.

search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.[24] The government's burden should be particularly heavy since "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[25]

Without consent the agents would not have gained access to Ackerson's house for any justifiable purpose and their entry would amount to a search.[26] With reasonable suspicion, however, an officer may legally approach the house of a criminal suspect in order to make general inquiries.[27] As long as the door is not opened in response to a threat or a command, the actions of the agents are considered part of an investigation and not a "search." Thus, if the agents merely requested to speak with the occupants of the house and Ackerson opened the door in compliance, no search occurred at that point and any contraband detected by the agents' olfactory access into Ackerson's home was lawfully obtained under the "plain view" doctrine.[28] The testimony of the agents involved in the instant search shows that the government has failed in its burden of demonstrating free and voluntary consent.

Three federal drug enforcement agents parked their vehicles in front of appellant Ackerson's house, A fourth agent remained at some distance as a precautionary measure. Special Agent Glendell Wayne Roberts was designated to knock on the door of the residence and communicate with the occupants. Agent O'Neil accompanied him.[29] Roberts

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[24] 391 U.S. at 548, 88 S.Ct. at 1792 (footnote omitted).

[25] *United States v. United States Dist. Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L. Ed.2d 752 (1972).

[26] *See United States v. Vicknair*, 610 F.2d 372, 377 (5th Cir.), *cert. denied*, 449 U.S. 823, 101 S.Ct. 83, 66 L.Ed.2d 25 (1980)

[27] *United States v. Knight*, 451 F.2d 275, 278 (5th Cir.1971), *cert. denied*, 405 U.S. 965, 92 S.Ct. 1171, 31 L.Ed.2d 240 (1972); *Davis v. United States*, 327 F.2d 301, 303 (9th Cir.1964).

[28] *Coolidge v. New Hampshire*, 403 U.S. 443, 465-71, 91 S.Ct. 2022, 2037-41, 29 L.Ed.2d 564 (1971).

[29] Record on Appeal, vol. 6, at 11.

was dressed in civilian clothes and had his hand on his holstered gun at this time.[30] He stated:

> I knocked on the door, and at first, no one would answer the door. I knocked, I continued to knock, on the door, and I stated–I announced I was the police, that I wanted to talk. I said, "I'm a police officer, I would like to talk to you, I need for you to come here."
>
> I said it in English and Spanish because we were working with a group of Colombians at the time.[31]

A third officer, Special Agent Steven K. Widener, was standing at the side of the house with his gun drawn, observing the proceedings.[32] Widener's testimony was as follows:

> I could hear Agent Roberts shouting, "Police officers! We want to talk to you!" He said it several times, both in English and in Spanish.
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> * * * * * *
>
> For a short period of time, I would say about three maybe four minutes, there was absolutely no response. We knew someone was in the house because we'd just seen them go in. We'd never taken our visual off of the house.
>
> I was preparing to go to my car radio and all [sic] for assistance, backup, a uniformed officer to come to assist us and, at that time, at the same moment, the door opened. I heard the door open. I heard Agent Roberts in a dialogue with someone at the front door.[33]

The agents in this case demanded entry under "color of authority." Magic words of demand, such as "open-up," are not necessary to constitute coercion. Rather, it is the actions of the officers and the context in which the words are spoken

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[30] Record on Appeal, vol. 4, at 62.

[31] *Id.* at 27.

[32] Record on Appeal, vol. 6, at 32.

[33] *Id.* at 12.

that dispose of the issue.[34] Agent Roberts knocked and shouted for three to four minutes that he was a police officer and that he needed the appellants to come to the door. These actions do not, under the totality of the circumstances, amount to a request. The knocking was too long and too adamant to put Roberts in the category of any other public member asking for entry. Furthermore, Ackerson never verbally agreed to allow the agents to enter or to search the garage. Ackerson's actions in this regard further support the idea that Ackerson was reacting to the agents rather than consenting.[35] Because the agents demanded entry under the color of authority, they effected an unconstitutional search of Ackerson's house when they gained olfactory access through the open door.

Under the "totality of the circumstances" test enunciated by *Schneckloth v. Bustamonte*,[36] the search was far from consensual. The Court wrote, "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions . . ."[37] The Court also commented,

> [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.[38]

In this case, the "subtly coercive" circumstances included: the sudden appearance of three unmarked cars in the front

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[34] *See United States v. Walters*, 591 F.2d 1195, 1200 (5th Cir.) ("request" that appellant follow agent was no more than rhetorical question), *cert. denied*, 442 U.S. 945, 99 S. Ct. 2892, 61 L.Ed.2d 317 (1979).

[35] *Cf. Johnson*, 333 U.S. at 12, 68 S.Ct. at 368 (defendant "stepped back acquiescently"); *Pekar v. United States*, 315 F.2d 319, 325 (5th Cir.1963) (defendant seemed "confused").

[36] 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

[37] 412 U.S. at 229, 93 S.Ct. at 2049.

[38] 412 U.S. at 228, 93 S.Ct. at 2048.

of the house; one agent at the side of the house with his gun drawn; two armed agents standing at the front door; one agent rapping on the door for several minutes while shouting that the police were outside and that he wanted to talk to the occupants; and then the same agent asking a number of accusatory questions. Of course under these circumstances Ackerson and Tobin did not verbally or physically bar the agents from coming in; the agents' actions clearly *implied* that the full force of the government would be brought to bear upon the residents of the house if the door was not opened and the garage was not allowed to be searched. Taking all of the circumstances together, Roberts' request was a command and Ackerson's consent was coerced.

The majority fails adequately to distinguish *Pekar v. United States.*[39] The facts in that case are very similar to those at issue:

> Upon arrival outside defendant's room, [the agents] knocked. Defendant answered, "who is there?" to which [Agent] Beale replied, "I want to talk to you regarding an official investigation of the F.B.I." The defendant declined to answer, and the agents waited outside the door for 10 minutes, and again asked the same questions. The defendant asked how he would know that they were from the F.B.I., and the agents presented their identification through the louvers of the outer louvered door, there being double doors to defendant's room. He then asked for more proof, and Beale gave him the telephone number of the F.B.I. office and told him to call, but to the knowledge of Beale, the defendant did not call. Then the defendant opened the door and the agents walked in displaying their credentials.[40]

The court then found that the defendant was coerced into admitting the agents, in that the door was opened only in

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[39] 315 F.2d at 319.

[40] *Id.* at 323.

the wake of the agents' persistent efforts, and "[t]he agents merely told defendant when he asked what they wanted that they wanted to talk to him about an investigation not that they wanted to search his room."[41] As in *Pekar*, in the instant case the federal agents only gained entry through their persistence–repeatedly knocking on the door while shouting "Police Officers!" The doors in both cases were opened on misleading pretenses. In the instant case, the officers claimed that they wanted to *talk* to the residents about the unloading operation they had observed; they never indicated that what they really wanted to do was to *search* the house. Only a very active imagination could imply consent to search under these circumstances.

The majority distinguishes *United States v. Edmondson*,[42] by noting that there, the officer's command was an imperative, while in this case, Agent Roberts testified that he requested to speak with the occupants. *Edmondson's* facts are not so easily distinguishable:

> After consulting an FBI legal advisor, the decision was made to knock on the door in an attempt to determine the identity of [a suspect]. The agents did not have a search nor arrest warrant. With weapons drawn, and with the vicinity in front of the apartment surrounded, the agents kncoked on the door and saw Edmondson look out of the window. At this point, an agent yelled, "FBI. Open the door." Edmondson opened the door, stepped back, and placed his hands upon his head.[43]

Our court found that Edmondson's act in stepping out of the door, hands on his head, did not amount to an implied consent to be arrested. The court did not base this holding on the fact that the agent told Edmondson to open the door; rather, it held that 'his consent to the entry into his residence [was]

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[41] *Id.* at 325.

[42] 791 F.2d 1512 (11th Cir.1986).

[43] *Id.* at 1514.

prompted by a show of official authority."[44]

The majority likens the consent given in this case to that given in *United States v. Willis.*[45] The circumstances of that case bear out the poverty of the analogy. In *Willis,* an officer telephoned a hotel room whose occupants were under investigation. "A man answered, and Park identified himself as a police officer, explaining he was next door and wanted to talk face to face. The person in Room 222 said 'Okay.' [The officers] then knocked, and a man . . . opened the door."[46] The events in *Willis* were quite similar to those that are present when any private citizen requests perrmission to visit. And the defendant even gave an explicit verbal authorization for the police entry. But no normal neighbor (or constitutionally sanctioned police officer) bangs on the door for minutes, shouts his authority for demanding an audience, and then enters without receiving permission.

When the government does not first seek a warrant, it has the burden of showing that a free and voluntary consent was given to search a home. As related by the government's own witnesses, the facts here show that no such consent was given. As the Supreme Court noted over a century ago,

> [i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.[47]

It follows that this court should construe the Fourth Amendment to require the suppression of evidence derived from the coerced "consent" given in this case.

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[44] *Id.* at 1515.

[45] 759 F.2d 1486 (11th Cir.), *cert. denied,* 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985).

[46] *Id.* at 1493.

[47] *Boyd v. United States,* 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886).

III. CONCLUSION

Respectfully I submit that the majority errs in holding that the officers' warrantless search of Ackerson's house was justified by the exigent circumstances exception to the warrant requirement. Further, the majority finds a consensual search under circumstances not heretofore condoned by any court. I would reverse the district court's denial of Ackerson's motion to suppress.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ronald TOBIN, Clifford Roger Ackerson,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ronald TOBIN, Defendant-Appellant.

Nos. 87-6015, 88-5274.

United States Court of Appeals,
Eleventh Circuit.

Nov. 22, 1989.

Appeals from the United States District Court for the Southern District of Florida.

Before CLARK and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

CLARK, Circuit Judge:

In these appeals we face the difficult task of further defining the parameters of the Fourth Amendment. Both appellants, Ronald Tobin and Clifford Ackerson, appeal the denial of their motions to suppress evidence seized at Ackerson's home on March 19, 1986. We find that Tobin lacks standing to challenge either the search of Ackerson's home and garage or the search of the car found inside of the garage. We further find that the search of Ackerson's home was illegal because Ackerson opened the door to his residence in acquiescence to a show of official authority. Thus, Ackerson's motion to

suppress should have been granted. The district court's order is therefore affirmed in part and reversed in part.

I. FACTS

On March 19, 1986, U.S. customs Special Agents Wayne Roberts and Gerald O'Neil and Drug Enforcement Administration Special Agents Steven Widener and Charles Cecil were conducting a surveillance in the area of 104th Street and Southwest 144th Court in Miami, Florida. They were in a field northwest of the front of appellant Clifford Ackerson's house. This surveillance was initiated pursuant to an investigation unrelated to the appellants in this case.

At about 3:30 or 4:00 p.m., Agent Roberts attention was drawn to a Mercury Marquis traveling on 144th Street. This car attracted his attention due to the manner in which it turned and traveled up the street, and Agent Roberts began watching it because it was similar to one he had followed earlier in the day as part of the unrelated surveillance.

Agents Roberts and Widener saw the car quickly stop in the middle of the streeet and back into the driveway of the residence at 10411 S.W. 14th Court. There was already a pickup truck parked in the front yard of that house. Appellant Ronald Tobin then jumped out of the car, looked around, and ran to the front door of the residence. Tobin knocked and within one minute, Ackerson admitted him to the house. Shortly after Tobin entered the house, the garage door was opened three-quarters of the way by Ackerson, who looked up and down the street while holding the door. Tobin also peered out of the garage and, looking up and down the street, he crouched down and eased out of the garage. Tobin then used a key to open the trunk of the car he had parked in the driveway. He took three full tubular plastic bags out of the trunk and very quickly put them into the garage. The bags were about four feet long and were covered in heavy clear plastic wrapping, with smaller packages inside. Tobin again looked up and down the street and immediately hopped back

into the garage. During this time the agents observed the front of another vehicle which had been backed into the garage. The agents were able to make these observations because they were using binoculars. Based on their experience, both Agents Widener and Roberts suspected that Tobin had put cocaine into the house.

The agents decided to go to the door, and to talk to the occupants of the house in the hopes of securing a consent search. Three of the agents pulled up to Ackerson's house in their own individual vehicles. Agent Roberts went to the front door accompanied by Agent O'Neil who served as a backup for security purposes. Agent Widener went to the corner of the house along the southern wall of the house's exterior and the garage door and stood there with his gun raised. Although there is no direct evidence, Widener was apparently out of sight because he could not see the front door from where he was positioned.

Agent Roberts knocked on the door and initially received no answer. He continued to knock for three to four minutes as he shouted in English and in Spanish, "I'm a police officer, I would like to talk to you, I need for you to come here." One of the agents began to call for uniformed back-up but stopped when Ackerson finally answered the door. When the door was opened, Agent Roberts displayed his credentials and told Ackerson he was a Customs Agent, Roberts stated that he had reason to believe someone had just put cocaine into Ackerson's garage and that he would like to talk to Ackerson about the car that Tobin had backed into the driveway.

Initially Ackerson denied that anyone had backed up to his garage door in a car or that anyone else was in his home. During this conversation with Ackerson, Agent Roberts could smell the odor of marijuana coming from inside the house. Ackerson finally called Tobin to the front door. When Tobin appeared, Agent Roberts again identified himself and told Tobin he wanted to talk to him about the car Tobin had backed into the driveway. Both Agent Roberts and Tobin were outside

the door of the house. Tobin said that he had not driven there. When Agent Roberts explained that he had witnessed Tobin take bags out of the trunk of the car by the garage door and place them inside the garage, Tobin denied it.

Agent Roberts then stated that he believed Ackerson and Tobin were "up to something." Roberts stated that they all should go to the garage and see what was there. At that time, Ackerson, who was standing in the doorway of the house, turned and walked inside the house towards the garage. Agent Roberts followed, along with Tobin and Agent O'Neil to the rear. All four individuals proceeded directly to the garage. Once inside the garage, Agent Roberts asked Ackerson to open the garage door. Ackerson proceeded around the passenger side of a Mercury station wagon bearing an Oregon license plate which had been backed into the garage and opened the garage door.

As the door went up, Agent Widener, who was standing outside on the driveway with his gun drawn, reholstered the gun and saw the tubular bags he had seen earlier when they had been moved into the garage and thrown on the floor by Tobin. One bag had been pulled farther in than the others, and two or three of the smaller packages had been taken out of the bigger bag and were lying on the ground. One package was open. When Agent Widener realized that the packages spread out in front of him contained cocoaine, he reported that fact to Agent Roberts who initially believed, given the smell of marijuana, that perhaps Widener was mistaken and it was marijuana in the garage. The elapsed time from the arrival of Agent Roberts at the front door to the discovery of the cocaine was between ten and fifteen minutes. Prior to finding the cocaine, Agents Roberts and O'Neil had their guns unholstered but not drawn.

After discovery of the cocaine, Tobin and Ackerson were placed under arrest. Agent Roberts asked Ackerson if anyone else was in the house and Ackerson said "no." Because Ackerson had not only lied about Tobin's presence in the house

a few minutes before, but also because there were three vehicles on the premises and only two persons had been located, Roberts was not satisfied with Ackerson's answer. To ensure their own safety, Agents Roberts and O'Neil did a security sweep of the house. During this security sweep, the agents found three bales of marijuana in the shower stall of the master bedroom's bathroom. The agents then conducted a more general search, opening drawers in the master bedroom and looking under the couch cushions in the living room.

While inside the garage, Agent Widener noticed through the windows of the station wagon parked there that all of the screws had been removed from the floorplate over the wheel well in the back of the vehicle. Tobin and Ackerson had been arrested and the security sweep had been conducted. Agent Widener searched the station wagon. Upon opening the back gate and lifting up the plate in the station wagon, Agent Widener saw brown paper grocery bags inside. Based upon his experience with the way drug money is handled and his belief that a drug deal was occurring, Agent Widener believed the bags contained money. While holding the plate with one hand, Agent Widener pulled the top of one paper bag back with the other hand, revealing U.S. currency. Later, it was determined that the cash totaled approximately $775,000.

After the cocaine had been found on the garage floor, the defendants were given their *Miranda* warnings. Prior to either defendant invoking his *Miranda* rights, the agents learned from Ackerson that he owned the house. Tobin, on the other hand, told the agents that he did not live in the house. Both defendants denied any knowledge of the cocaine or possession of the marijuana. Both defendants indicated that they had no knowledge of and did not own the station wagon with Oregon tags in Ackerson's garage. Similarly, both Ackerson and Tobin denied knowledge and ownership of the money found in the station wagon in the garage. Nonetheless, the keys to the station wagon in the garage were found in Tobin's possession. A subsequent check by the DEA showed

that the station wagon parked in Ackerson's garage on March 19th and bearing Oregon plates was registered to Ellen P. Mekulich of Tigar, Oregon, a suburb of Portland, as of March 3, 1986. Prior to that the station wagon's owner had been a Ben Chrystal of Portland, Oregon.

II. DISCUSSION

Both appellants Tobin and Ackerson claim that the agents gained entry to Ackerson's home only through a show of official authority. Thus, the appellants allege that the agents conducted a "search" within the meaning of the Fourth Amendment when Ackerson opened the door. Without probable cause and exigent circumstances, the appellants contend that this search was illegal. The government counters that the agents, as part of an investigation, knocked on the door, called out their identities and requested to speak to the occupants. According to the government, these actions did not amount to a command and Ackerson's opening of the door was therefore voluntary. Thus, argues the government, at that point no "search" occurred within the meaning of the Fourth Amendment and the agents lawfully obtained the smell of the marijuana as evidence in "plain view." Before we discuss the merits of these arguments, we must first address Tobin's standing to challenge the search at issue.

A. STANDING

[1] In *Rakas v. Illinois*, 439 U.S. 128, 139, 99 S.Ct. 421, 428, 58 L.Ed.2d 387 (1978), the Supreme Court held that under the Fourth Amendment, courts should analyze standing "within the purview of substantive Fourth Amendment law." Thus, our inquiry into Tobin's standing proceeds directly to the substantive question of whether the challenged search and seizure violated his Fourth Amendment rights. In other words, we ask whether Tobin possessed a legitimate expectation of privacy in the premises searched or in the items seized. *United States v. Rackley*, 742 F.2d 1266, 1270 (11th

Cir.1984). A legitimate expectation of privacy is an expectation actually and subjectively held by the defendant and one which society is prepared to recognize as reasonable. *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979).

The appellants allege that, under the totality of the circumstances, Tobin had a legitimate expectation of privacy in the house. First, he provided Ackerson with the money to keep up the mortgage payments when Ackerson was injured and could not work; second, Tobin made substantial use of the house; and finally, the appellants allege that Ackerson gave Tobin the primary use of his garage. The government counters that even accepting the appellants' assertions, Tobin did not demonstrate any proprietary interest in the house nor did he establish an *unrestricted* right of occupancy to the premises. Without such proof, argues the government, Tobin lacks the privacy interest necessary to challenge the search.

[2,3] The burden of establishing a legitimate expectation of privacy in the searched premises lies with the individual asserting the Fourth Amendment violation. *Rakas,* 439 U.S. at 130 n. 1, 99 S.Ct. at 424 n. 1. Accepting the district court's factual findings with regard to Tobin's privacy interests in Ackerson's house, we agree with the government and the district court that Tobin has failed to meet this burden. First, the district court accepted Ackerson's testimony that Tobin loaned Ackerson money for the house after Ackerson had been injured in a motorcycle accident and could not work. The district court also found that Ackerson meant to pay Tobin back whenever the house was sold. The court concluded, however, that this sort of "loan" does not create a possessory interest. We agree.

[4] A mere financial interest in certain property does not confer Fourth Amendment standing in that property. *See United States v. McConnell,* 500 F.2d 347 (5th Cir.1974), *cert. denied,* 420 U.S. 946, 95 S.Ct. 1327, 43 L.Ed.2d 424 (1975) (defendant could not challenge search of car leased to co-

defendant even though defendant had paid for rental car with his own credit card). Legal title to the house lies with Mr. and Ms. Ackerson. Tobin has never asserted either legal or equitable title to the house. In fact, he never even stipulated that the money he gave to Ackerson was to be repaid. Any agreement between Ackerson and Tobin that Tobin would be repaid from the proceeds of the house upon its sale was both indefinite and informal. Thus, Tobin has not established a possessory interest in the searched house.

Tobin may nonetheless challenge a search of the house if he can show that he had an unrestricted right of occupancy in the premises which included the right to exclude others. *United States v. Sarda-Villa,* 760 F.2d 1232, 1236 (11th Cir.1985); *United States v. Torres,* 705 F.2d 1287, 1294-95 (11th Cir.), *vacated in banc, consideration pending remand to panel,* 718 F.2d 998 (11th Cir.), *on appeal after remand,* 741 F.2d 1323 (11th Cir.1984) (defendants would have standing if they had unencumbered right to access of premises and were overnight guests). As to this issue, the district court accepted the fact that Tobin used the house from time to time. Indeed, Ackerson testified that Tobin had personal items in the house and that Tobin frequently stayed overnight. Nonetheless, the district court found that Tobin used the house more frequently in the years of 1984 and 1985 before Ackerson remarried. After Ackerson's remarriage, the district court found that, because there was no guest room, Tobin stayed in the house only on those week-ends that the Ackersons were away.

The search in question occurred on a Wednesday. Tobin was not alone at the house on the day in question, but was admitted by Ackerson after knocking on the door. Tobin had not stayed at the house the night before and the district court found that he could not have been planning to stay there on the night of the search. Although Ackerson testified that Tobin had a key to the house, Tobin did not use the key to enter the house and the agents did not find any such key in Tobin's possession.

"What is a reasonable expectation of privacy is by definition related to time, place and circumstances." *United States v. Vicknair,* 610 F.2d 372, 380 (5th Cir.), *cert. denied,* 449 U.S. 823, 101 S.Ct. 83, 66 L.Ed.2d 25 (1980). Thus, in *Vicknair,* this court held that while the owner of a boat had given each of his sons permission to use the boat, none of the sons were residing aboard it when the boat was searched. Furthermore, none of the sons testified that he had used the boat as either a temporary or a permanent residence. As a result, we found that none of the defendants had a legitmate privacy interest in the vessel. Likewise, in the present case, Tobin, who may have been in a position to assert a Fourth Amendment right to Ackerson's house had the agents come to the house during one of the week-ends that Ackerson was away and Tobin was staying there, was not in such a position on the day of the search.

This situation differs from *United States v. Jones,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) in which the Supreme Court found that the defendant had a privacy interest in his friend's apartment. In that case, the defendant had slept in the apartment the night before, had the key to the apartment while the friend was away, had stored his personal belongings there and, due to his friend's absence, had the exclusive right to exclude others. In the instant case, Tobin was not an overnight guest and did not admit himself with his key on the day in question. Thus, at the particular time, he had not adopted the residence as his own. *See also Torres,* 705 F.2d at 1294-95 (where appellants were houseguests of searched house, ate, slept and showered there, stored personal belongings there and were the only guests in the house at time of search, appellants would have standing to challenge search); *United States v. Garcia,* 741 F.2d 363, 366 (11th Cir.1984) (although appellant had more than tenuous interest in searched apartment, appellant had no standing where connections were not regular or personal enough to find that appellant adopted apartment as a place of business or as a residence).

Indeed, this case is analogous to *Rackley,* 742 F.2d 1266. In *Rackley* we held that although the appellant had the key to a house and had stayed there several times during the month of June, the appellant never kept a full wardrobe there and was not staying at the house during the time frame of the search. Under these circumstances, this court held that the appellant did not have a legitimate expectation of privacy in the house on the day in question. Likewise, we find that Tobin simply has not established that he had an "'unrestricted right of occupancy or custody and control of the premises as distinguished from occasional presence.'" *Sarda-Villa,* 760 F.2d at 1236 (citation omitted).

[5] Furthermore, Tobin has not established that he had a legitimate expectation of privacy in the garage. The fact that Tobin stored items in the garage is not the type of significant interest that confers standing to challenge the search of an area. In *United States v. Meyer,* 656 F.2d 979 (5th Cir.1981), *cert. denied,* 465 U.S. 1065, 104 S.Ct. 1413, 79 L.Ed.2d 739 (1984), this court held that the defendant must establish a legitimate expectation of privacy *in the particular area searched* in order to have standing to challenge a particular search or seizure (emphasis added). Therefore, Tobin's expectation of privacy in the garage cannot depend on his status as an occasional overnight guest. *See Rackley,* 742 F.2d at 1270. Instead, he must establish an independent expectation of privacy in the garage.

Nothing in the record persuades us that Tobin had any reasonable expectation of privacy in the whole garage rather than only in the items he stored in the garage. Ackerson testified merely that Tobin sometimes parked his or his girlfriend's cars in the garage and the he also kept some boxes there. Ackerson further testified, however, that the Ackersons also stored items in the garage, such as his children's bicycles. Moreover, the entire Ackerson family had access to the garage through the door in the kitchen. In fact, the only way to gain access to the garage is through the door of the house because

the key to the outside door had been lost. While Ackerson testified that Tobin asked Ackerson to keep anyone from "messing" with the cars parked in the garage, there was no understanding that others would not be allowed access to the garage itself. Finally, Tobin disclaimed any possessory interest in either the cocaine or the station wagon found in the garage. Thus, while Tobin might have had a subjective expectation that the things stored in Ackerson's garage would be kept private, he had no way to insure that the garage itself would be protected from intrusion. *Cf. Meyer,* 656 F.2d at 981 (certain areas, like bathroom cabinets, are not areas of dwelling place in which visitors normally have an expectation of privacy). We agree with the district court that:

> although Tobin may have had an expectation of privacy in the [pockets of the] suits he allegedly left in the closet, in the [closed] shave kit he allegedly left somewhere in the house and [in] the sealed boxes he allegedly left in the garage, he has failed to establish that he had a legitimate expectation of privacy in the floor of Ackerson's garage or [in] the shower stall in the bathroom.

D.Ct. Order at 52.

[6] Turning finally to the question of whether Tobin had a legitimate expectation of privacy in the station wagon found in the garage, we hold that he does not. Tobin did not testify at any of the suppression hearings, but the testimony of the agents was that Tobin denied any knowledge of the vehicle and denied owning it. The agents eventually found a set of keys to the station wagon in Tobin's pocket but Tobin stated that he did not know if these keys were the ones to the car. After a search of the automobile produced cash, both defendants also denied knowledge of the currency. The government produced evidence that the car belonged to an individual in Oregon. The only testimony supporting Tobin's expectation of privacy came from Ackerson. He testified that although he did not know if Tobin owned the car, Tobin had parked the station wagon in the garage several weeks ago

and told Ackerson not to let anyone "mess with it."

[7] Even if Ackerson's testimony were enough to establish that Tobin had a legitimate expectation of privacy in the vehicle, we find that Tobin abandoned this expectation when he disclaimed any knowledge or interest in the car. "This Court has ruled that disclaiming ownership or knowledge of an item ends a legitimate expectation of privacy in that item." *United States v. Hawkins,* 681 F.2d 1343, 1345 (11th Cir.), *cert. denied,* 459 U.S. 994, 103 S.Ct. 354, 74 L.Ed.2d 391 (1982). In *Hawkins,* we held that the appellant did not have a legitimate expectation of privacy in a suitcase to which the appellant disclaimed any interest. *See also United States v. McKennon,* 814 F.2d 1539 (11th Cir.1987) (no legitimate expectation of privacy when appellant disclaimed any knowledge of individual carrying seized suitcase before the suitcase was searched and then further disclaimed any interest in the suitcase after the suitcase was searched).

[8] Although not every disclaimer of ownership will result in the abandonment of a Fourth Amendment interest, Tobin's actions were clearly enough. Tobin did not own or lease the car and the agents had seen him drive up to the house not in the station wagon but rather in the sedan parked outside of the garage. Thus, except for the keys found in Tobin's pocket, nothing even links Tobin to the station wagon. Indeed, having the keys to a car or even driving the car would not be sufficient to establish a property or possessory interest in the car unless the suspect also claimed such an interest. *Cf. United States v. Miller,* 821 F.2d 546, 548-49 (11th Cir.1987) (driver of borrowed car had standing to challenge search where driver consistently asserted that he had borrowed the car with owner's permission); *United States v. Costner,* 646 F.2d 234 (5th Cir. Unit A 1981) (where defendant never asserted a legitimate expectation of privacy in a car in which he was a passenger, defendant has no standing to challenge search of that car). Thus, this case is distinguishable from *United States v. Hall,* 716 F.2d 826 (11th Cir.1983), *cert. denied,* 467

U.S. 1251, 104 S.Ct. 3534, 82 L.Ed.2d 840 (1984), where this court found that the defendant had not abandoned his interest in a Ryder truck parked in a legal space at a shopping mall. Although the defendant suspected he was being followed and did not have the keys to either the cab or the storage area, the truck was currently leased to him and he never denied ownership of the vehicle. In this case, by contrast, Tobin had no property interest in the station wagon and he denied any interest in the car. Under these circumstances, we find that Tobin abandoned any privacy interest in the car that he might have otherwise had.

[9] In sum, we hold that Tobin lacks a legitimate expectation of privacy in either the house or the garage where he was not an overnight guest on the day of the search and where he did not own, lease or have the right to exclude others from the garage. In addition, he lacks a legitimate privacy interest in the station wagon found inside the garage. Thus, Tobin may not challenge the propriety of the agents' search and the part of the district court's order denying Tobin's motion to suppress is affirmed. The disposition of Tobin's claim, however, does not end this case. As legal owner of a private home, Ackerson clearly has the requisite standing to challenge the agents' search of the home and we must therefore address the propriety of their actions as these actions relate to him.

B. THE SEARCH

[10, 11] In this case, the district court held that the agents did not transgress Ackerson's Fourth Amendment rights at the door of Ackerson's house. The district court concluded that with reasonable suspicion, the agents were authorized under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) to detain the defendants for questioning "notwithstanding the possibility of a technical trespass." The district court misapplied *Terry*. In that case, the Supreme Court held that it was constitutional for a police officer to stop a suspect in

the street for questioning and a possible frisk when the officer has a "reasonable suspicion" that such action is necessary. The *Terry* analysis does not apply to intrusions into the home, however, because an individual's residence enjoys special protection under the Fourth Amendment. *See Arizona v. Hicks,* 480 U.S. 321, 328, 107 S.Ct. 1149, 1154, 94 L.Ed.2d 347 (1987) (officer must have probable cause to search residence); *United State v. Davis,* 423 F.2d 974, 977 (5th Cir.), *cert. denied,* 400 U.S. 836, 91 S.Ct. 74, 27 L.Ed.2d 69 (1970) (person's home holds favored position in list of those areas protected from unreasonable searches and seizures). Instead, we require that an officer have probable cause before searching someone's home and even then the officer may proceed only with a warrant or under exigent circumstances. *Hicks,* 480 U.S. at 328, 107 S.Ct. at 1154; *Coolidge v. New Hampshire,* 403 U.S. 443, 954-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971).

[12] Thus, the threshold question in this case is whether the agents conducted a search within the purview of the Fourth Amendment when they smelled the marijuana through the open door of Ackerson's house. The resolution of this inquiry depends on whether the agents' conduct at the door amounted to a demand of entry under color of authority. If so, then Ackerson could have not consented to allow the agents either visual or olfactory access to the house because, "[w]here there is coercion, there cannot be consent." *Bumper v. North Carolina,* 391 U.S. 543, 550, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968). Without consent, the agents would not have gained access to Ackerson's house for any justifiable purpose and their entry would amount to a search. *See Vicknair,* 610 F.2d at 377. With reasonable suspicion, however, an officer may legally approach the house of a criminal suspect in order to make general inquiries. *Davis v. United States,* 327 F.2d 301, 303 (9th Cir.1964); *United States v. Knight,* 451 F.2d 275, 278 (5th Cir.1971), *cert. denied,* 405 U.S. 965, 92 S.Ct. 1171, 31 L.Ed.2d 240 (1972). As long as the door is not opened in response to a threat or a command, the

actions of the agents are considered part of an investigation and not a "search." Thus, if the agents merely requested to speak with the occupants of the house and Ackerson opened the door in compliance, no search occurred at that point and any contraband detected by the agents' olfactory access into Ackerson's home was lawfully obtained under the "plain view" doctrine. *Coolidge,* 403 U.S. at 465-71, 91 S.Ct. at 2037-41.

Whether Ackerson voluntarily opened the door is a question of fact that must be determined from the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 248-49, 93 S.Ct. 2041, 2058-59, 36 .Ed.2d 854 (1973). While neither Ackerson nor Tobin testified as to whether Ackerson opened the door voluntarily, all of the agents did testify as to the circumstances surrounding their initial entry into the house. No factual dispute exists over what happened. In such a situation, as long as the record is adequate, the district court's failure to address the question of consent does not prevent us from passing on the issue. *Cf. Miller,* 821 F.2d at 559-50 (appellate court decided issue of consent based on record); *United States v. Newbern,* 731 F.2d 744, 748 (11th Cir.1984) (appellate court first to pass on issue of consent); *United States v. Walters,* 591 F.2d 1195, 1200 (5th Cir.), *cert. denied,* 442 U.S. 945, 99 S.Ct. 2892, 61 L.Ed.2d 317 (1979) (appellate court first to pass on issue of consent). Instead, we may decide the question based on the officers' conduct. If the officers demanded entry under color of authority, there can be no consent as a matter of law. *United States v. Winsor,* 846 F.2d 1569, 1573 n. 3 (9th Cir.1988); *see also Bumper,* 391 U.S. at 550, 88 S.Ct. at 1792 (where there is coercion there cannot be consent).

On the one hand, FBI agents shouting "police, open up," with or without guns drawn, is clearly a "forcible" entry in which the defendant has no choice but to acquiesce. Thus, in *United States v. Edmonson,* 791 F.2d 1512 (11th Cir.1986), we found that the appellant did not consent to being arrested within his residence when an official show of authority

prompted his consent to the officers' entry. The agents blocked the exits to the appellants' apartment building and one agent shouted "FBI; open up!" Although there was no direct evidence that the appellant ever saw the FBI agents draw their guns, the appellant did see FBI agents both at his door and at the bottom of the stairs in his apartment complex. We found this enough to amount to a demand of entry.

We also found a lack of consent to entry in *Newbern*, 731 F.2d 744. In that case, the police knocked on the appellant's hotel door and the appellant pulled back the curtain of his window to see who was knocking. He then saw the officers with their badges out and their guns drawn. We found that "[t]he fact that [the appellant] then told the officers to come in, under such circumstances, cannot be termed entry based on consent." *Id.* at 748.

On the other hand, where the police ask for entry in a non-threatening manner and ask merely to speak to the suspect, the occupant is complying with a request that any public member could make, and opening the door is generally considered voluntary. For example, we found that the appellant voluntarily consented to the officers' entry into the appellant's hotel room in *United States v. Willis*, 759 F.2d 1486 (11th Cir.1985). In that case, the officer first telephoned the appellant's motel room and asked the appellant if they could talk "face-to-face." The appellant agreed, opened the door when the officer knocked, and said "come in." *Id.* at 1493, 1498.

[13] The situation in the present case lies somewhere between the polar examples mentioned above. In this case, the agents went to the door and, after initially receiving no answer, continued to knock for three to four minutes. Agent Roberts shouted in both English and Spanish that he was a police officer, that he wanted to talk to the appellants and that he needed the appellants to come to the door. Ackerson finally opened the door and stepped back. Under these circumstances, the situation is most analogous to the Supreme

Court case of *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948) and this circuit's case of *United States v. Pekar*, 315 F.2d 319 (5th Cir.1963).

In *Johnson*, the Supreme Court held that the police effected an unlawful search when they followed up on a tip that someone in a hotel room was smoking opium. Once they identified the odor as coming from a specific room, they knocked on the door. The occupant asked who was there and one of the officers answered, "Lieutenant Belland." After some shuffling, the occupant answered the door and the lieutenant stated that he wanted to talk to the occupant "a little bit." The occupant then stepped back and admitted the officers. The Supreme Court specifically found that "[e]ntry into defendant's living quarters, which was the beginning of the search, was demanded under color of office." *Id.* 333 U.S. at 13, 68 S.Ct. at 368.

Similarly in *Pekar*, the FBI was notified that luggage had ben stolen from an airplane. Upon investigation, the agents believed that the suspect had gone into a certain hotel and the agents located his room. At this point, however, the agents had only reasonable suspicion to investigate and not probable cause. The agent knocked on the door and the suspect asked who was there. The agent replied that he was an FBI agent and that he wanted to talk to the suspect about an official investigation. The suspect did not answer and about ten minutes later the agent knocked again. This time the suspect asked how he could be sure that the man was really an FBI agent and the agent showed him his credentials through the open louvers. The suspect then let the agents in and gave them permission to search his room. This court held that in this situation the suspect had been impliedly coerced into submitting to a search of his hotel room. We found the agents created "an aura of officialdom," and along with the defendant's refusal to sign a warrant waiver, this show of authority rendered the entry unconstitutional.[1]

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[1] We wish to emphasize that our holding in this case does not suggest that police officers cannot identify themselves as such and seek admission into a home without such conduct constituting coercion.

[14] We find that the agents in this case demanded entry under "color of authority." Agents Roberts knocked too long and too adamantly to put him in the category of any other public member asking for entry. The agent's shouting for three or four minutes that he was a police officer and that "he needed the appellants to come here" does not, under the totality of the circumstances, amount to a request. The magic words of demand such as "open-up," are not necessary to constitute coercion. Rather, it is the actions of the officers and the context in which the words are spoken that disposes of the issue. *See Walters,* 591 F.2d at 1200 ("request" that appellant follow agent was no more than rhetorical question). In this case, three unmarked vehicles pulled up curbside to Ackerson's property. Three agents got out of the vehicles and went up to Ackerson's house. Two of the agents purposefully positioned themselves as "back-up" to the agent knocking on the door, with one of the agents standing near the front door and the other agent "hiding" with his gun drawn. Agent Roberts knocked and shouted for at least three to four minutes. Furthermore, we note that Ackerson never verbally agreed to allow the agents to enter or to search the garage. Ackerson's actions in this regard further support the idea that Ackerson was reacting to the agents rather than consenting. *Cf. Johnson,* 333 U.S. at 12, 68 S.Ct. at 368 (defendant "stepped back acquiescently"); *Pekar,* 315 F.2d at 325 (defendant seemed "confused"). Because the agents demanded entry under color of authority, they effected a search of Ackerson's house when they gained olfactory access through the open door.

A survey of the cases in other circuits does not alter our conclusion. In the Ninth Circuit, for example, the court held in *Davis,* 327 F.2d 301, that the door was voluntarily opened upon request when the appellant's eight year old daughter invited the officer into the house. The officer was a plain clothes police officer who knocked on the door to question the appellant about certain drug deals in which the appellant had been implicated. When the girl opened the door, the

officer asked if he could speak to the appellant and the girl let him in. In contrast, in *Winsor,* 846 F.2d at 1573, the Ninth Circuit held, in an *en banc* decision, that the appellant did not consent to entry of police officers when the officers knocked on the door, identified themselves and demanded that the door be opened. The distinctions made in these two opinions are consistent with our resolution of the present case.

Furthermore, the situation presented here is distinguishable from that in the two cases from other circuits relied upon by the government, *Robbins v. Mackenzie,* 364 F.2d 45 (1st Cir.), *cert. denied,* 385 U.S. 913, 87 S.Ct. 215, 17 L.Ed.2d 140 (1966) and *United States v. Griffin,* 530 F.2d 739 (7th Cir.1976). In *Robbins,* only one officer knocked on the door and he knocked only once. The officer identified himself and said he wished to talk to the suspect. The suspect opened the door. The suspect did not attempt to ignore the officer nor did the officer repeatedly tell the suspect that "he needed for him to come here." In addition, only one officer was present and no vehicles pulled up to the house. Likewise, in *Griffin,* 530 F.2d at 743-44, the suspect said no the first time the officers knocked on the door and requested entry. The suspect then shut the door in the officers' face. The officers knocked again a few minutes late to inform the suspect that a co-suspect had been caught fleeing the apartment. Upon learning of this development, the suspect allowed the officers in. The court held that this second request was not coercive because the officers fully informed the suspect of the reason for their continued presence *before* gaining entry into the apartment. In the present case, Ackerson did not know the nature of the officers' visit until after he had opened the door and they had already gained entry into his home.

In finding that the agents demanded entry, we are really deciding that the agents coerced Ackerson into opening the door. As discussed above, this finding forecloses the possibility that Ackerson acted voluntarily in allowing the agents access

to his home. Under these circumstances, we find that the agents conducted a "search" of Ackerson's house. This conclusion is further supported by the agents' testimony concerning the purpose of their visit. Agent Roberts testified that he went to the door "to determine–talk with the people in the house to ask them what they had put in the garage." Agent Widener was more explicit:

Q. Now you said that in your opinion three agents was a small number of agents to approach the house?
A. Yes, sir.
Q. Why?
A. Well, for security, safety reasons we would generally conduct a search with five, six, seven agents.
Q. So the normal course of action would be to use five or six agents for a search rather than three?
A. Yes, sir.
Q. And you would have now felt more comfortable doing this with five or six agents?
A. Yes, sir.
Q. And I think you also said you wanted more agents if you intend to do an arrest?
A. For safety, yes, sir.
Q. I take it you then had it in your mind at the time you approached the house that you may well be arresting somebody in the house?
A. Yes, sir.

* * * * * *

Q. What questions had you decided that Roberts was going to ask the occupant?
A. He was going to ask him what he had just taken out of the trunk of a car and put into the garage.
Q. Anything else?
A. Well, in response to that we were going to try to get a consent search.
Q. Did you discuss what would happen if you didn't

get a consent search?

A. Not really.

Q. Had you made the decision that because this was narcotics that you'd better seize it anyway even without consent?

A. We did not discuss that, no.

Q. Did you think that?

A. I probably did, yes, sir.

* * * * * *

Q. Is there any doubt in your mind as you sit here today, Agent Widener, your purpose of going on to the premises of Mr. Ackerson's house was to search for criminal activity?

A. No, no doubt in my mind.

Q. That's why you were there, wasn't it?

A. That's right.

R-6-31, 34, 86.

[15] While the inquiry we make is whether the agents coerced Ackerson into opening the door, we note that the agents' subjective intent in entering private property is a relevant factor in determining whether an illegal search has occurred. *See, e.g., Vicknair,* 610 F.2d at 377 (admittedly illegal purpose of searching a boat coupled with attempts to observe interior of house, belies officers' assertion that they went onto property to locate owner); *Knight,* 451 F.2d at 278-79 (crucial inquiry in determining whether search is illegal is officer's purpose for entering private property); *Davis,* 423 F.2d at 977 (illegal search where officers went to home for sole purpose of finding pistol); *Davis,* 327 F.2d at 303 (no rule which makes it illegal *per se* for officer peaceably to walk up and knock on house with honest intent of asking questions of the occupant). Here, at least one of the agents admitted that the agents approached the door for the express purpose of finding what was in the garage and of making a possible arrest. That the agents hoped consent would be given does not obscure the fact that they intended to gain access to the

house in any event.

In sum, case law supports our conclusion that the agents in this case demanded entry under color of authority. Thus, once Ackerson opened the door, the agents were in a position in which they had no right to be. *Davis,* 423 F.2d at 977. Under these circumstances, the agents "obtained" the smell of marijuana through a warrantless search of Ackerson's home. In order to justify this warrantless search, the agents' level of suspicion should have been one of probable cause accompanied by exigent circumstances that required the agents to act quickly.

[16-19] In this case, both the magistrate and the district court held that the agents did not have probable cause when they approached the house and that probable cause did not exist until the agents smelled the marijuana after Ackerson opened the door. Without probable cause, the search of Ackerson's house, which began at the door, was illegal. Furthermore, any exigent circumstances that existed by virtue of the appellants' knowledge that they had been discovered were circumstances created by the government. The government cannot justify a warrantless search based on exigent circumstances of its own making. *United States v. Munoz-Guerra,* 788 F.2d 295, 298 (5th Cir.1986). In the present case, the agents could have maintained surveillance until they obtained more evidence. If a car pulled up to take the suspected drugs away, the agents could have easily detained the driver. Therefore, the whole search was illegal and cannot be cured by any subsequent consent or need to act based on exigent circumstances. Consequently, with respect to Ackerson, any evidence found in the search of Ackerson's garage, the security sweep of the house and the search of the car must be suppressed as the fruits of the ongoing, illegal search. *See United States v. Robinson,* 690 F.2d 869, 877-78 (11th Cir.1982).

III. CONCLUSION

Because the agents created an "aura of officialdom" and demanded that Ackerson open the door, the agents in this case effected a search within the purview of the Fourth Amendment when Ackerson acquiesced to this demand. This search was effected without consent and without probable cause. Although the subsequent search of the garage and car and the security sweep were all undertaken with probable cause, this probable cause was illegally obtained. Thus, all of the evidence seized in these searches must be suppressed as to Ackerson. Because Tobin lacks standing to challenge the propriety of the agents' search and seizure actions, none of the seized evidence is suppressible as to him. The district court's order is therefore

AFFIRMED IN PART and REVERSED IN PART and the case REMANDED for further proceedings.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-6015

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD TOBIN,
CLIFFORD ROGER ACKERSON,

Defendants-Appellants.

No. 88-5274

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD TOBIN,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITITON(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion February 21, 1991, 11th Cir., 1991, ___F.2d___).

Before: TJOFLAT, Chief Judge, FAY, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, COX, BIRCH and DUBINA, Circuit Judges, and HENDERSON*, Senior Circuit Judge.

PER CURIAM:

[✓] The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are Denied.

*Senior Circuit Judge Albert J. Henderson elected to participate in this decision, pursuant to 28 U.S.C.A. § 46(c)

[ ] The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

[ ] A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

Supreme Court, U.S.
FILED
SEP 17 1991
OFFICE OF THE CLERK

No. 91-143

In the Supreme Court of the United States

OCTOBER TERM, 1991

RONALD TOBIN AND CLIFFORD ROGER ACKERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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QUESTIONS PRESENTED

1. Whether exigent circumstances justified the entry by law enforcement officers into petitioner Ackerson's house.

2. Whether petitioner Ackerson was acting voluntarily when he opened the door of his house in response to law enforcement officers' request.

3. Whether, having granted petitioner Tobin's request for rehearing en banc, the court of appeals lacked authority to affirm the district court's denial of petitioner Ackerson's motion to suppress.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-143

RONALD TOBIN AND CLIFFORD ROGER ACKERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1-28) is reported at 923 F.2d 1506. The panel opinion of the court of appeals (Pet. App. 29-51) is reported at 890 F.2d 319.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1991. A petition for rehearing was denied on May 31, 1991 (Pet. App. 52-53). The petition for a writ of certiorari was filed on July 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners each entered a conditional plea of guilty to one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Each was sentenced to 15 years' imprisonment and fined $100,000. The court of appeals affirmed (Pet. App. 1-28).

1. On March 19, 1986, while conducting surveillance unrelated to this case in a residential neighborhood of Miami, Florida, agents of the Drug Enforcement Administration and the U.S. Customs Service saw a Mercury Marquis automobile stop abruptly in front of petitioner Ackerson's house and then back into the driveway. Petitioner Tobin got out of the car and ran to the front door of the house. Ackerson opened the front door of the house and let Tobin in. A few minutes later, Ackerson lifted the door of the garage at the rear of the house and looked up and down the street. Tobin emerged from the garage, likewise scanned the street, and took three plastic tubular bags from the trunk of the Mercury. The bags were about four feet long and filled with smaller packages that were visible from the outside. Tobin hurriedly carried the bags into the garage. The agents could see a station wagon parked inside the garage and a pickup truck on the lawn of the house. Pet. App. 2.

The agents concluded that the bags probably contained cocaine. One of the agents went up to the front door of Ackerson's house, knocked on it, and initially received no answer. He continued knocking for three or four minutes and called out that he was a police officer and wanted to talk to the occupants of the house. When Ackerson opened the door, the agent identified himself and said that he had just seen

someone take what he believed was cocaine out of the car in the driveway and put it in Ackerson's garage. Ackerson denied that anyone had recently backed into his driveway and denied that anyone else was in the house. Tobin then came to the door and denied having driven the Mercury to the house, even after the agent said that he had seen Tobin do so. As the agent stood in the doorway, he smelled marijuana inside the house. Pet. App. 3; see also C.A. Record Excerpts 14-17.

The agent said he thought they should go to the garage and see what was there. Ackerson led the agent, Tobin, and a second agent through the back of the house and into the garage. In the garage, the agents saw the three bags that Tobin had taken out of the Mercury. One bag was open and clearly contained cocaine. The agents then arrested Ackerson and Tobin and conducted a protective sweep of the house. They found three bales of marijuana in one of the bathrooms and $775,000 in cash in the station wagon in the garage. Pet. App. 3-4; C.A. Record Excerpts 17-20.

2. The district court denied petitioners' motions to suppress the evidence found in Ackerson's house and garage. The court held, first, that the agents were justified in entering the house without obtaining a warrant. The court determined that the agents had probable cause to believe that drugs would be found in the house based on their surveillance, the smell of marijuana coming from inside the house, and petitioners' denial of what the agents had witnessed. The court also determined that, in light of the "strong possibility" that the drugs would be destroyed or removed before a warrant was obtained, exigent circumstances justified the search of the house and garage. C.A. Record Excerpts 48. The court further

held that the marijuana in the house was discovered during a valid security sweep. Finally, the court held that neither petitioner had standing to contest the search of the station wagon in the garage. *Id.* at 45-50.

3. A panel of the court of appeals affirmed in part and reversed in part. Pet. App. 29-51. The panel affirmed the denial of Tobin's motion to suppress, holding that Tobin lacked standing to contest the search. *Id.* at 34-41. The panel reversed as to Ackerson, however. *Id.* at 41-50. It found that Ackerson did not open the door voluntarily; rather, it held that the agents had "demanded entry under color of authority" by "knock[ing] too long and too adamantly" on the door and shouting their request to speak with Ackerson. *Id.* at 43, 46. The court also found that exigent circumstances did not justify the search. *Id.* at 50.

4. Tobin sought rehearing and rehearing en banc on the issue of whether he had standing to contest the search. The court of appeals granted rehearing en banc and vacated the panel opinion. 902 F.2d 821 (1990). The court of appeals, sitting en banc, subsequently affirmed the district court's denial of each petitioner's motion to suppress.[1]

The court held, first, that the search of petitioner Ackerson's house was permissible because it was based on probable cause and exigent circumstances. The court determined that the agents had probable cause to believe that petitioners were engaged in illegal drug activity after the agents saw petitioners furtively transfer the plastic bags from the car to the garage. Pet. App. 7. The court further deter-

[1] The court of appeals assumed without deciding (Pet. App. 6) that both Ackerson and Tobin had standing to contest all aspects of the searches conducted by the agents.

mined that the agents were justified in entering the house to search for the drugs because exigent circumstances justified their search. *Id.* at 7-9. The court emphasized that "the 'presence of contraband without more does not give rise to exigent circumstances.'" *Id.* at 8 (quoting *United States* v. *Torres*, 705 F.2d 1287, 1297, vacated and remanded on other grounds, 718 F.2d 998 (11th Cir. 1983)). Instead, the court observed, "[t]he test whether exigent circumstances exist is an objective one," requiring an inquiry into "whether the facts * * * would lead a reasonable, experienced agent to believe that evidence might be destroyed before a warrant could be secured." Pet. App. 8 (internal quotation marks omitted). The court held that the test was satisfied here. The court reasoned that the presence of at least two persons in the house and three vehicles outside the house raised the possibility that someone would depart with the drugs before the agents could obtain a warrant. *Ibid.* In addition, the court observed, "the agents could reasonably conclude from [petitioners'] hurried actions and furtive looks that [petitioners] were either aware or afraid that someone was watching them." *Id.* at 9. Based on those facts, the court concluded, "exigent circumstances [existed] which would permit a warrantless search even prior to the approach to the house." *Ibid.*

The court held, in the alternative, that the search was permissible even assuming the agents did not have probable cause when they approached the house. The court reasoned that, before the agents approached the house, they had at least a reasonable suspicion that drugs would be found inside the house. Pet. App. 10. Although reasonable suspicion cannot justify a warrantless search, the court observed, "it

can justify the agents' approaching the house to question the occupants." *Ibid.* The court noted that after Ackerson opened the door and the agents smelled marijuana, the agents plainly had probable cause. Exigent circumstances also existed at that point, the court determined, since "[petitioners] and anyone else who might have been present in the house would have been aware of the agent's suspicions at that moment." *Ibid.* The court rejected petitioners' argument that the agents created the exigent circumstances by "us[ing] their position to demand entry." *Id.* at 11. The court observed that the agents who approached the house were dressed in plain clothes and displayed no weapons. *Ibid.* Moreover, the court noted, the agent who called out at the door "did not use the imperative" but instead "phrased his words in the form of a request." *Id.* at 12.[2]

Judge Clark, joined by two other judges, dissented. Pet. App. 14-28. The dissenting judges assumed that the agents had probable cause to believe that drugs would be found in the house, but they did not believe that exigent circumstances justified the entry (*id.* at 15-21) or that Ackerson opened the door voluntarily (*id.* at 21-27).

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[2] The court of appeals also rejected petitioners' challenges to the scope of the protective sweep of the house and to the search of the station wagon. Pet. App. 13-14. Petitioners do not renew those challenges in this Court.

ARGUMENT

1. Petitioners concede (Pet. 6) that the agents had probable cause to believe that Ackerson's house contained contraband, but they contend (Pet. 6-11) that there were no exigent circumstances justifying a warrantless entry at the time the agents approached the house. In *Minnesota* v. *Olson*, 110 S. Ct. 1684 (1990), this Court endorsed the principle that exigent circumstances exist when the police have probable cause to believe that the destruction of evidence is imminent. *Id.* at 1690; see also *Vale* v. *Louisiana*, 399 U.S. 30, 34-35 (1970). The court of appeals in this case applied the same principle in holding that the police may search without a warrant when the facts known to the police would lead a reasonable, experienced officer to conclude that evidence might be destroyed before a warrant could be obtained. Pet. App. 8. The court's decision thus represents a "fact-specific application of the proper legal standard," *Olson*, 110 S. Ct. at 1690. For that reason, it does not warrant further review.

The court of appeals' finding of exigent circumstances was correct. As the court of appeals found, petitioners acted as if they knew they might be under surveillance; the law enforcement agents did not know how many persons might be in Ackerson's house, but they knew that three cars were parked around the house; and the agents did not have enough personnel to cover the back of the house. Thus, it was reasonable for the agents to believe that petitioners or their confederates might attempt to remove the cocaine before the agents could obtain a warrant. Pet. App. 8-9.

Contrary to petitioner's claim (Pet. 6-9), the courts of appeals do not employ conflicting standards

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in finding exigent circumstances. Other courts of appeals have applied substantially the same standard that the court used in this case. See *United States* v. *Grissett*, 925 F.2d 776, 778 (4th Cir.) (question is whether an "objective officer could reasonably believe" that "evidence might be destroyed"), cert. denied, 111 S. Ct. 2245 (1991); *United States* v. *Munoz*, 894 F.2d 292, 296 (8th Cir.) (officers must have a "reasonable belief that evidence of the crime was in imminent danger of removal or destruction"), cert. denied, 110 S. Ct. 1934 (1990); *United States* v. *Zabare*, 871 F.2d 282, 291 (2d Cir.) (test is whether "reasonable, experienced agents * * * would have been justified in concluding that the destruction of contraband was imminent") (internal quotation marks omitted), cert. denied, 110 S. Ct. 161 (1989); *United States* v. *Rodriguez*, 869 F.2d 479, 485 (9th Cir. 1989) ("exigent circumstances exist to justify a warrantless entry if officers act on probable cause, in good faith, and with a reasonable belief, from the totality of the circumstances, that evidence or contraband will be imminently destroyed"); *United States* v. *Sangineto-Miranda*, 859 F.2d 1501, 1512 (6th Cir. 1988) (officers must have "an objectively reasonable basis for concluding that the loss or destruction of evidence is imminent"); *United States* v. *Socey*, 846 F.2d 1439, 1445 (D.C. Cir.) (exigent circumstances justify an entry when police have "an objectively reasonable basis for concluding that the destruction of evidence is imminent"), cert. denied, 488 U.S. 858 (1988); *United States* v. *Napue*, 834 F.2d 1311, 1326 (7th Cir. 1987) ("[e]xigent circumstances exist where the police have an objective and reasonable fear that evidence is about to be destroyed"); *United States* v. *Moore*, 790 F.2d 13, 15 (1st Cir. 1986)

("exigent circumstances exist when government agents reasonably believe that evidence will be destroyed"); *United States* v. *Rubin*, 474 F.2d 262, 268 (3d Cir.) (officers must "reasonably conclude that the evidence will be removed or destroyed"), cert. denied, 414 U.S. 833 (1973). In short, the courts of appeals differ only in the verbal formulations used to describe the standard for determining whether exigent circumstances exist. Those minor variations in language do not reflect a difference in the standard applied. Review by this Court is therefore unwarranted, especially in light of the Court's recent clarification of the applicable standard in *Olson*.

Nor is it true, as petitioners assert (Pet. 6), that there is a conflict among the circuits over whether "narcotics are a special class of evidence which because of their destructibility create a special type of 'exigency.'" Several courts, like the court of appeals in this case, have observed that the need to preserve evidence is heightened when narcotics are involved. See *United States* v. *Grissett*, 925 F.2d at 778; *United States* v. *Sangineto-Miranda*, 859 F.2d at 1511-1512; *United States* v. *Socey*, 846 F.2d at 1444-1445; *United States* v. *Rubin*, 474 F.2d at 268-269. Those courts have accordingly cited the ease with which narcotics can be destroyed as one factor relevant to determining whether exigent circumstances exist. Cf. *Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966). Contrary to petitioners' contention (Pet. 7 n.1) however, no court has adopted a *per se* rule under which the mere presence of narcotics is dispositive. Nor did the court of appeals do so in this case. To the contrary, the court emphasized that "the presence of contraband without more does not give rise to exigent circumstances." Pet. App. 8 (internal quotation marks omitted). In short, petitioners fail to identify a con-

flict among the courts of appeals that warrants this Court's attention.[3]

2. Petitioners next contend (Pet. 11-14) that the court of appeals erred in finding, as an alternative basis for upholding the search, that petitioner Ackerson opened the door of his house voluntarily. That fact-bound claim does not merit review.

A consent to search is valid if it is freely and voluntarily given. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222-223 (1973). A consent to search that is coerced by a show of authority is invalid, as the court of appeals recognized. Pet. App. 11. See *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968). Applying these well-settled principles, the court of appeals observed that the agent who knocked on Ackerson's door "did not use the imperative" and that, instead, "he phrased his words in the form of a request." Pet. App. 12. The court also found it relevant that only two agents approached the door and that they were in plain clothes and did not display their weapons. *Id.* at 11. Under these circumstances, the court reasonably concluded that the agents did not use a show of authority to obtain entry into the house.

Contrary to petitioners' contention (Pet. 12-13), the court's conclusion does not conflict with this

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[3] Petitioners' reliance (Pet. 8) on *Hall* v. *Shipley*, 932 F.2d 1147 (6th Cir. 1991), and *United States* v. *Tracy*, 835 F.2d 1267 (8th Cir.), cert. denied, 486 U.S. 1014 (1988), to support the existence of a conflict is misplaced. At issue in those cases was whether the police were excused from complying with the knock and announce statute, 18 U.S.C. 3109, when executing warrants to search for narcotics. That issue obviously is not present here. Petitioners also err in relying (Pet. 7 n.1) on *United States* v. *Munoz-Guerra*, 788 F.2d 295 (5th Cir. 1986). The court there held, on facts very different from those in the present case, that there were no exigent circumstances to justify a warrantless search. *Id.* at 297-298.

Court's decision in *Johnson* v. *United States*, 333 U.S. 10 (1948). In *Johnson*, police officers smelled opium coming from a hotel room. One of the officers then knocked on the hotel room door and, after the defendant opened the door, immediately entered and told the defendant, "I want you to consider yourself under arrest because we are going to search the room." *Id.* at 12. That statement left the defendant in *Johnson* with no choice but to acquiesce in the ensuing search. Because the officer had declared that the police were "going to" search with or without the defendant's consent, the Court in *Johnson* concluded that consent "was granted in submission to authority." *Id.* at 13.

This case is quite different from *Johnson*. The agents in this case did not declare that they were "going to" enter and search the house, nor did they take any other action amounting to a show of official force. Petitioners' reliance on *Johnson* is therefore misplaced.[4]

3. Ackerson contends (Pet. 14-15) that the court of appeals sitting en banc had no authority to reverse the panel decision in his favor. The en banc court simply reviewed, and affirmed, the district court's denial of

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[4] Petitioners' reliance (Pet. 13) on *Florida* v. *Bostick*, 111 S. Ct. 2382 (1991), is likewise unavailing. *Bostick* is inapposite here, for it involved a different legal issue in a different factual setting, namely, whether an encounter in a public place between the police and the defendant involved a "seizure" under the Fourth Amendment. *Id.* at 2386. Petitioners' claim that the court of appeals' decision conflicts with *United States* v. *Shaibu*, 920 F.2d 1423 (9th Cir. 1990), is even wider of the mark. That case concerned whether the defendant impliedly consented to the entry of police officers into his apartment. *Id.* at 1425. Thus, the issue in *Shaibu* was whether consent was given at all, not the quite different question whether the consent that was given was coerced.

Ackerson's and Tobin's
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CLUSION

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(3)

No. 91-143

in the Supreme Court of the United States

October Term, 1991

RONALD TOBIN and
CLIFFORD ROGER ACKERSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

The government's brief lends support to the Petition for Writ of Certiorari. It underscores a critical issue in this case: whether circumstances in which evidence "might be destroyed" are sufficiently exigent to warrant abandoning the constitutional guarantees of the Fourth Amendment.

The government's argument compounds speculative events which agents believed "might" occur, seeking to equate them with "exigency."

> [P]etitioners acted as if they knew they *might* be under surveillance;
>
> * * *
>
> Thus, it was reasonable for the agents to believe the petitioners or their confederates *might* attempt to remove the cocaine. . . .

(Response 7). The reasonableness of those beliefs is suspect given the undisputed facts—that three four-foot long tubular bags had just been unloaded into the garage of an occupied house, and three armed agents *with a two-way radio* were stationed around the house. (Pet. App. 2, 21).

This Court has likened an exigency to a "now or never" situation. *See Roaden v. Kentucky,* 413 U.S. 496, 505 (1973); (Petition 9, note 2). Unlike an "imminent" event, which is on the verge of occurring and supports the exigency exception to the warrant requirement, an event which "might" occur is balanced by an equally probable "might not," and fails to meet the "now or never" test. While the Eleventh Circuit is not alone in applying the "might occur" standard to the exigency exception to the Fourth Amendment, such a

permissive test clearly falls on one end of a continuum of verbal formulations applied by the different courts of appeal.

The government's brief purports to deny the conflict among the circuits on this issue (Response 7, 8), yet the cases cited by the government reveal the obvious lack of uniformity. On one end of the continuum, exigency is defined strictly, pertaining to circumstances where evidence "will be" removed or destroyed. *United States v. Moore,* 790 F.2d 13, 15 (1st Cir. 1986); *United States v. Rubin,* 474 F.2d 262, 268 (3d Cir. 1973). Most courts use the intermediate definition, that destruction is "imminent." *United States v. Zabare,* 871 F.2d 282, 291 (2d Cir. 1989); United States v. Rodriquez, 869 F.2d 479, 485 (9th Cir. 1989); *United States v. Sangineto-Miranda,* 859 F.2d 1501, 1512 (6th Cir. 1988); *United States v. Socey,* 846 F.2d 1439, 1445 (D.C. Cir. 1988). Of the cases cited by the government, the Eleventh and Fourth Circuits stand alone in their use of the "might be destroyed" standard. *United States v. Grissett,* 925 F.2d 776, 778 (4th Cir. 1991).[1] (Response 8, 9).

What the government characterizes as "minor variations" in verbal formulations is, instead, a substantial difference in the quantum of urgency required to invoke the exigency exception in the various circuits. (Response 9). The conflict, and its significance to Fourth Amendment rights, cannot be denied. Therefore certiorari should be granted.

---

[1]Petitioners cited one other "might be" case: *United States v. Napue,* 834 F.2d 1311, 1326 (7th Cir. 1987). (Petition 8).

Respectfully submitted,

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